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AN EPITOME

OF

LEADING CONVEYANCING

AND

EQUITY CASES;

WITH SOME SHORT NOTES THEREON:

CHIEFLY INTENDED AS

A Guide to "Tudor's Leading Cases on Conveyancing," and "White and Tudor's Leading Cases in Equity."

BY

JOHN INDERMAUR,

SOLICITOR

(FIRST PRIZEMAN, MICHAELMAS TERM, 1872),

AUTHOR OF "AN EPITOME OF LEADING COMMON LAW CASES,"
"SELF-PREPARATION FOR THE FINAL EXAMINATION,"
"PRINCIPLES OF THE COMMON LAW,"
"MANUAL OF PRACTICE,"
"SELF-PREPARATION FOR THE INTERMEDIATE EXAMINATION,"
"MANUAL OF THE PRINCIPLES OF EQUITY," &c. &c.

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PREFACE TO EIGHTH EDITION.

THE seventh edition of this work has been out of print for some little time, and I should have published this edition earlier had it not been that I thought it advisable to await the new edition of "White and Tudor's Leading Equity Cases." By the courtesy of the Publishers of that work, I was favoured with an advance copy of the new (seventh) edition, and hence some considerable further delay has been saved. I have gone carefully into the new edition of "White and Tudor," and made all such additions and alterations in this Guide as were necessary, and as seemed to me advisable. Huntingdon *v.* Huntingdon has been omitted from "White and Tudor" now, and I also have left it out of this edition. I have, however, added Scott *v.* Tyler, and also Howard *v.* Harris from "White and Tudor," and I have given Low *v.* Bouverie in preference to Burrowes *v.* Lock. The Editors of the new edition of "White and Tudor"

have considerably altered the arrangement of the cases, but I have not attempted to follow their arrangement, though I have considerably altered my own, by endeavouring to make the cases follow on in more appropriate order. In the Index to Cases Epitomized I have added a note of the subject of each case, which may prove useful. I have very carefully revised the whole of the notes to the principal cases, and made considerable alterations and additions, giving various statutory enactments, and recent cases, dealing with the various subjects. I trust students will continue to find this Epitome of service to them, but I would still urge upon them the advisability of a thorough study of the large volumes, and some may find it a very useful plan to have this small work interleaved with blank pages, and as they read add to the notes at their discretion.

J. I.

22, Chancery Lane, London,
November 1897.

PREFACE TO FIRST EDITION.

In the same way that his "Epitome of Leading Common Law Cases" is intended by the Author as a guide to "Smith's Leading Cases," so this Epitome is meant to constitute a stepping-stone to the study of the well-known "Leading Cases" in Equity by Messrs. White and Tudor, and the "Conveyancing Cases" by Mr. Tudor, and it contains all the cases set out in those volumes—except some few which have been thought not now of so much practical importance—together with several additional ones. If it will induce the student to explore the mines of learning to be found in those valuable works, the Author's object will be fully attained.

The Conveyancing and Equity cases are here epitomized together, because they generally bear such a close relationship, many of those indeed which are given in the Equity volumes, more especially, bearing quite as

much on Conveyancing: thus, in the Final Examination at Michaelmas Term last, under the head of "Conveyancing," two questions were asked directly on Messrs. White and Tudor's Equity Cases, and it is also very convenient to consider them together.

April 1873.

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Note.—The edition of "Tudor's Leading Cases on Conveyancing" to which reference is made in this Epitome is the 3rd, published in 1879; and the edition of "White and Tudor's Leading Cases in Equity" to which reference is made is the 7th, published in 1897.

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AN EPITOME

OF

LEADING CONVEYANCING

AND

EQUITY CASES.

RICHARDSON v. LANGRIDGE.

(*Lead. Cas. Conv.* 4.)
(4 *Taunt.* 128.)

Decided:—That if an agreement be made to let premises so long as both parties like, and reserving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called; but if there is a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing is said about the duration of the term, it is an implied letting from year to year.

Notes.—Tenancies from year to year owe their origin to the inconveniences found to result from tenancies at will, which were only partially remedied by the doctrine of emblements, and the Courts at a very early period raised an implied contract for a tenancy from year to year (Lead. Cas. Conv. 23). The above case shows the rule for determining when a tenancy

is for years and when at will. The leaning of the Courts is always to construe the tenancy as from year to year. Although a tenancy originally be at will, yet it may afterwards, by payment of rent or other circumstances, be converted into a tenancy for years (see Epitome of Lead. Common Law Cases, 8th edit. 77).

The cases of *Walsh* v. *Lonsdale* (21 Ch. D. 9; 52 L. J. Ch. 2) and *Coatsworth* v. *Johnson* (55 L. J. Q. B. 220) should be here noticed. The first case decides that, when a tenant goes into possession under an agreement for a lease, and before a lease has been actually granted, there are now, since the fusion of Law and Equity effected by the Judicature Acts, no longer two estates, one at Law, and another in Equity, under the agreement; but there being one Court only, there can be but one estate, and that, substantially, if the tenant has a right to a lease, he is in the same position as if that lease were granted. The second case decides that the exact position of a tenant under such circumstances is, that at first, on entering, he is but a tenant at will, though he may have a right to specific performance of the agreement, and that when he has paid rent referable to any aliquot part of a year, he is then a yearly tenant on such terms of the agreement as are applicable to the yearly tenancy—this, again, subject to any right he may have to get specific performance of the agreement. (See also *Swain* v. *Ayres*, 21 Q. B. D. 289; 57 L. J. Q. B. 428.)

The proper notice to determine a yearly tenancy is half a year, expiring at the end of the current year of the tenancy. However, under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), a *year's notice*, expiring at the end of the current year of the tenancy, is substituted for the usual half-year's notice (sect. 33) in those tenancies to which the Act applies—viz., tenancies wholly or in part agricultural, or pastoral, or cultivated as a market-garden (sect. 54), and provided that the landlord and tenant have not, by writing under their hands, agreed that this provision shall not apply (sect. 33). A notice to quit part only of the premises included

in a lease is bad, except that, under provisions of the Act just mentioned (sect. 41), a notice may be given by the landlord with a view to certain uses to be made of the land in the Act specified, to be stated in the notice, which may relate to part only of the holding; but the tenant may, within twenty-eight days of the receipt of the notice, serve on the landlord a counter-notice, in writing, to the effect that he accepts the same as a notice to quit the entire holding at the end of the current year of the tenancy. A monthly tenancy merely requires a month's notice, and a weekly tenancy a week's notice (*Bowen* v. *Anderson* (1894), 1 Q. B. 164). In the case of lodgings a reasonable notice only is required, and what is a reasonable notice depends on the circumstances of each particular case. If a tenancy determines, and the landlord has made a demand and given notice in writing for possession, and the tenant holds over, he is liable to pay double the yearly value of the premises, unless he had a *bonâ fide* belief that he had a right to so hold over (4 Geo. 2, c. 28, sect. 1); and if a tenant gives notice to quit, and does not give up possession at the proper time, he is liable to pay double the yearly rent of the premises (11 Geo. 2, c. 19, sect. 18).

LEWIS BOWLES' CASE.

(*Lead. Cas. Conv.* 37.)
(11 *Co.* 79 *b.*)

The following were the chief points resolved :—

1. That a tenant in tail, after possibility of issue extinct, shall *not* be punished for waste.

2. That if a tenant for life fells timber, or pulls down the house, the lessor shall have the timber; but if the house falls down, the particular tenant has a special property in the timber to rebuild the house.

3. That a tenant for life *without impeachment of waste*, has as great power to do waste and convert it at his own pleasure, as has a tenant in tail.

4. That the property in severed trees vests in a tenant for life without impeachment of waste.

GARTH v. COTTON.

(2 *Lead. Cas. Eq.* 970.)
(1 *Ves.* 524, 546.)

Mr. Garth, the father of the plaintiff, was tenant of lands for ninety-nine years, if he should so long live, *without impeachment of waste, except voluntary waste;* remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail; remainder to defendant in fee. Mr. Garth (before the birth of a son), and the

defendant, according to an agreement, cut down timber and divided the profits between them. The plaintiff was afterwards born, and, having suffered a recovery, brought this bill against defendant to refund his share of the profits of the timber received by him.

Decided:—That he was so entitled to recover from the defendant.

Notes on these two Cases.—The first of the above two cases is the leading case as to waste and the powers of persons having estates not of inheritance; it contains several important resolutions, and is always referred to on the subject. "Waste" is defined in Mr. Tudor's notes to *Lewis Bowles' Case* as "the destructive or material alteration of things forming an essential part of the inheritance"; and it is either voluntary, which is by the tenant's own act, or permissive, as by letting the premises go to ruin. The remedy for waste is either by action for damages for waste already committed, or an injunction may be obtained against future waste. An injunction cannot, however, be granted in cases of *permissive* waste, but the party injured must, if he has any right, be left to his remedy for damages. Waste is also divided with reference to the remedy into Legal and Equitable waste.

The liability of different owners for waste stands as follows:—

1. A tenant in fee simple being as nearly as can be absolute owner of his estate, can commit any act of waste he pleases, except indeed when there is an executory devise over, in which case he cannot commit equitable waste.

2. A tenant in tail may also commit any act of waste, but if he becomes tenant in tail after possibility of issue extinct, as he cannot bar the entail, he is not allowed to commit equitable waste. It seems, however, that tenants in tail restrained by statute from barring the entail, are not liable even for equitable waste.

3. A tenant for life is liable for all acts of voluntary waste,

unless indeed the property consists of a timber estate, planted for the purpose of timber being cut periodically, when he is justified in cutting it at proper times (*Honeywood* v. *Honeywood*, L. R. 18 Eq. 309; 43 L. J. Ch. 652; *Dashwood* v. *Magniac*, 60 L. J. Ch. 210). A tenant for life is not liable for permissive waste (*Barnes* v. *Dowling*, 44 L. T. 809; *Re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532; 58 L. J. Ch. 590), unless some obligation with regard to the same is specially thrown upon him (*Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609); and even when he holds his estate without impeachment of waste, he cannot commit equitable waste. If, however, it is necessary, for proper purposes of thinning and the like, to cut ornamental timber, he is justified in doing so, and if any such timber is properly cut it belongs to him (*Baker* v. *Sebright*, 13 Ch. D. 183; 49 L. J. Ch. 165).

4. A tenant from year to year is also of course liable for waste, but as to permissive waste, all that he is, in the absence of covenant, bound to do, is fair and tenantable repairs to keep the house wind and water tight, not any substantial or lasting repairs. On the other hand, the landlord is under no liability to repair in the absence of covenant to that effect. With regard to farms, a promise is implied by the law on the part of a yearly tenant, to use the farm in a husbandlike manner, and cultivate it according to the custom of the county (see Woodfall's Lld. & Tent., 639–641).

Voluntary waste may be committed, although it does no real injury to the inheritance, or even improves it. This is styled ameliorative waste, and really the liability in respect of it is more nominal than substantial, for the Court will not usually at the present day grant an injunction to restrain such waste (*Doherty* v. *Allman*, L. R. 3 App. Cas. 709), but will simply leave the reversioner or remainderman to recover the damages (if any) which he has sustained, and it is manifest that in most cases any such damages would be but nominal.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (3), it is provided that "an estate for life without impeachment of

waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." This is a provision arising naturally from the union of the former Courts of Law and Equity. Equitable waste was only recognisable and relievable against in Equity, the principle upon which Equity always interfered to prevent such acts being, that an implied trust was created in favour of the person or persons taking the ulterior interest. Law, however, knew no such doctrine, and suffered such acts to be committed with impunity, and in this we find an instance of the conflict between Law and Equity. All the former Courts being, by the Judicature Act, 1873, fused into one High Court of Justice, it would have been an anomaly to have allowed a remedy in the Chancery Division only. Therefore the object of the provision is to establish uniformity in all the Divisions, and the effect is to give a remedy for acts still known as equitable waste, in every Division of the Court.

In connection with the subject of waste, the provision contained in section 35 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), should be noticed. It is as follows: "Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber or any part thereof. Three-fourths of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits." See also sects. 28 (2) and 29.

As regards joint owners of an estate, as each has a right to enjoy the estate as he pleases, the Court will not in general grant an injunction to restrain any one of them from committing ordinary waste, but it will interfere to prevent malicious or destructive waste (2 Lead. Cas. Eq. 1007).

TYRRINGHAM'S CASE.

Lead. Cas. Conv. 120.)
(4 *Co.* 36 *a.*)

The following were the chief points resolved:—

1. That prescription does *not* make a thing appendant to another unless it agree in nature and quality with it, as a thing corporeal cannot be appendant to another corporeal thing, nor *vice versâ*, but a thing incorporeal may be appendant to a thing corporeal, or *è converso;* though a thing incorporeal cannot be appendant to a thing corporeal which does not agree with it in nature, so that a common of turbary cannot be appendant to land, but to a house it may.

2. That common appendant is of common right, and need not be prescribed for; but that it only belongs to ancient arable land, and for horses and oxen to plough, and cows and sheep to manure the land.

3. Common appendant is apportionable by the commoners purchasing part of the lands to which, &c., but not common appurtenant, for there by the purchase all the common is extinguished.

4. Unity of possession of the whole land is an extinguishment of common appendant.

5. Common by vicinage is not common appendant; but inasmuch as it ought to be by prescription time out of mind, it in this respect resembles common appendant.

6. Common appendant remains, though a house be afterwards built on the land, or the arable land be afterwards converted into pasture; but in pleading it ought to be claimed as appendant to land.

Note.—The above case is the leading authority as to commons, and rights of common. In Mr. Tudor's notes to this case a right of common is defined as "a right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another." There are properly four kinds of common—viz. (1) Common of pasture; (2) Common of piscary; (3) Common of turbary; and (4) Common of estovers; and to these is sometimes added a fifth sort—viz., Common in the soil. Common of pasture, which is the most usual and important sort, may be either (1) Appendant, (2) Appurtenant, (3) Because of vicinage, or (4) In gross. A person acquires a right of common either by grant, or by prescription. As to a grant, that speaks for itself; and with regard to prescription, that presupposes a grant. There is a considerable difference between prescription and custom. "In the Common Law," says Lord Coke, "*prescription* which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or of those whose estate he has; or in bodies politic or corporate and their predecessors; but a *custom*, which is *local*, is alleged in no person, but laid within some manor or other place." A prescription to take a profit in another's land—*e.g.*, to work quarries—is good; but a custom to that effect, except in the case of copyholders, or to search for and work mines under a local custom, is clearly bad, for it must have been illegal to commence with, and with regard to copyholders any custom must be reasonable. (Lead. Cas. Conv. 137.)

Formerly the right to common by prescription could be defeated by showing that enjoyment commenced since the beginning of the reign of Richard I. (for the reason for which, see Best on Evidence, 480); but now under the Prescription

Act (2 & 3 Will. 4, c. 71), the time for which a right of common must be enjoyed, to constitute a good title to it, is thirty years, after which it is only defeasible by reason of disability, and after sixty years it is indefeasible unless the holding be by consent given by deed or writing. This statute has not altered the nature of the right, or the principles upon which it is to be determined whether the right has been infringed, but has merely substituted a statutory title for the previous fictitious one (per *Lord Selborne* in *City of London Brewery Co.* v. *Tennant*, L. R. 9 Ch. App. 219; per *James, L.J.*, in *Kelk* v. *Pearson*, L. R. 6 Ch. App. 809; Goodeve's Modern Law of Real Property, 4th edit. 341).

Rights of common are subject to extinguishment in various ways, of which the following are the chief:—(1) By unity of ownership of land to which a Right of Common is annexed, with the land subject to the right; (2) By release; (3) By a Common Law enfranchisement; (4) By demise; (5) By encroachment on the waste, and possession thereof for twenty years; (6) By enclosure. (Edwards' Compendium of the Law of Property in Land, 3rd edit. 295.)

SURY v. PIGOT.

(*Lead. Cas. Conv.* 154.)
(*Poph.* 166.)

The following were the chief points determined :—

1. That a watercourse having its origin *ex jure naturæ*, and not from grant or prescription, is not extinguished by unity of possession ; but

2. A right of way having its origin either by grant or prescription, will be extinguished by unity of possession, unless it be a way of necessity, as a way to market or church.

3. Where a person has a house and ancient windows in it, and another person erects a new house and stops up the light, an action will lie.

Notes.—This case is the leading authority upon the law of easements. An easement is defined by Mr. Tudor in his notes to it as "a right which the owner of one tenement, which is called the dominant tenement, has over another, which is called the servient tenement, to compel the owner thereof to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former." Easements may arise by express or implied grant, or by prescription, or by Act of Parliament, or by reason of necessity. An instance of the last kind would be if A. grants to B. land surrounding a field which he retains : here A. has of necessity a reasonable right of way to get to the field he thus retains, though only, indeed, for the purpose of continuing the user of it in the same state. (*Corp. of London* v. *Riggs*, 13 Ch. D. 798 ; 49 L. J. Ch. 297.)

An easement may be either affirmative, as a right of way ; or negative, as a right to light. A negative easement may

also be described as a continuous easement, and an affirmative one as a discontinuous easement.

The time for which enjoyment of an easement must be had to constitute a good title was formerly the same as with regard to a right of common (*ante*, pp. 9, 10), but it is now fixed by the same statute as applies to rights of common—viz., the Prescription Act (2 & 3 Will. 4, c. 71). By that statute twenty years' uninterrupted enjoyment is to confer a title, except in the case of disability, and the right is to be absolute after forty years, unless the holding is by consent given by deed or writing. In the one case of light the right is to be absolute after twenty years' uninterrupted enjoyment, unless it has been enjoyed by consent in writing. As to an "interruption" it is provided that no act shall be deemed an "interruption" unless acquiesced in for one year after notice. (See as to the effect of this statute, *ante*, p. 10; and see as to what will and will not be an "interruption," and the onus of proof thereon, *Presland* v. *Bingham*, 41 Ch. D. 268; 60 L. T. 433.)

The chief ways in which an easement may be extinguished are as follows:—(1) By unity of possession; (2) By the authority of an Act of Parliament; (3) By release; and (4) By the abandonment of the enjoyment of the easement by non-user. *Sury* v. *Pigot* itself, although a general authority on the subject of easements, yet goes, it will be noticed, particularly to the point of extinguishment of easements, showing that easements will be extinguished by unity of possession, except where the easement is one actually of necessity, or it is some right arising *ex jure naturæ*. With regard to what will constitute an abandonment of an easement, it is not necessary to show any definite period of non-user, but what period is sufficient must depend on all the surrounding circumstances of the case (Goodeve's Modern Law of Real Property, 4th edit. 345).

A person can only gain a right to a view or prospect, by grant, covenant, or contract, and not by prescription. (See further as to easements, Goodeve's Modern Law of Real Property, 4th edit. 343–355; Edwards' Compendium of the Law of Property in Land, 3rd edit. 298–306.)

FOX v. BISHOP OF CHESTER.

(*Lead. Cas. Conv.* 238.)
(6 *Bing.* 1.)

Here, whilst the incumbent of the living was *in extremis*, but before he died, the next presentation was sold, but without the privity of, and without any intention to present, the particular clerk to the church when vacant.

Decided:—That this sale was not void on the ground of simony.

Notes.—But had the sale been when the living was actually vacant, it would have been simoniacal and bad. Simony is an offence consisting in the corrupt and unlawful presentation to a living, and this case may be quoted generally on the point, and also particularly as shewing how far one may go without being guilty of simony. But although a next presentation may be sold whilst the incumbent is living, yet it is simoniacal to purchase it with the intention of presenting any particular person. A person also cannot purchase a next presentation and present himself. An advowson is real property, but a next presentation is personal property.

It may be useful to here notice the subject of Resignation Bonds. These are bonds executed by a minister who is appointed to a living, when he agrees to resign it in a certain person's favour, and they are frequently had recourse to when the patron has some relative he may wish to present the living to, but who is not yet ordained, or some other circumstances render it impossible or inconvenient for him to take to the living at once. A general resignation bond is bad, but by 9 Geo. 4, c. 94, such a bond is to be good if in favour of any one person named, *or* one of two persons, each being by

blood, or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron or one of the patrons. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese, and the resignation when made must refer to the engagement, and state for whose benefit it is made.

TYRRELL'S CASE.

(*Lead. Cas. Conv.* 335.)
(*Dyer*, 155 *a.*)

Decided:—That there cannot be a use upon a use.

Notes.—The Statute of Uses (27 Hen. 8, c. 10) provided that where any person should stand seised of any hereditaments to the use, confidence, or trust of any other persons, &c., the persons, &c., who had any such use, confidence, or trust, should be deemed in lawful seisin and possession of the same hereditaments, for such estates as they had in the use, trust, or confidence. The above case decided that, the statute executing the first use declared, subsequent uses were void; and it was in consequence of this that the Court of Chancery stepped in, and thus arose the modern doctrine of uses and trusts. It will be observed that in consequence of the above case a person named before a use is declared takes no estate; he is, in fact, but a seisinee to use, or, it is said he is a conduit pipe through whom the estate passes to the owner of the use. But it must be borne in mind that there must be passed through the seisinee to uses, the same estate as it is desired to vest in the owner of the use. Thus a grant to A. to the use of B. and his heirs, will not give B. the fee simple, but only an estate for the life of A. The grant should be to A. and his heirs, to the use of B. and his heirs.

Whilst considering this case the student should bear in mind why it was that lands were, previously to the passing of the Statute of Uses, so commonly conveyed to uses. There were three prominent advantages gained by so conveying lands —viz. (1) The use, unlike the estate, was not liable to be forfeited for treason, &c.; (2) The use might be given to a charity; (3) Though the legal estate could not be disposed of by will, the land could be conveyed to such uses as should be appointed by will, and a will then made of the use. The

object of the Statute of Uses was of course to put an end to the practice which had previously existed of conveying lands to uses. Practically, however, by the decision in the above case, and the consequent holding of the Court of Chancery, the object of the Statute of Uses was frustrated. The immediate real effect of the statute may be illustrated thus:—If it were desired that A. should be constituted trustee of land for B., it would before the statute have been limited to A. to the use of B. Now, however, it would be limited unto and to the use of A., to the use of or in trust for B. In this case, though A. is no doubt in by the Common Law, yet the giving to him also of a use, makes the use to B. a subsequent or second use, and gives to B. the equitable or beneficial estate.

The Statute of Uses speaks only of one man being seised to the use of another; if, therefore, land is limited "unto and to the use of A. and his heirs," though A. takes the legal estate, it is not by force of the Statute of Uses, but by force of the Common Law. The declaration of a use here, however, prevents the possibility of any resulting use to the grantor. If it were a voluntary conveyance "unto A. and his heirs" simply, the use, and consequently the legal estate, would result to the grantor: adding the words "and to the use of" prevents this. A good consideration as well as a valuable consideration is, however, sufficient to prevent a resulting use.

It must be recollected that there are three modes of conveyance which operate only over the use, and do not pass the legal estate; that is to say, that although the person named gets the legal estate, it is not by the conveyance of the property, but by the force of the statute—viz. (1) A bargain and sale; (2) A covenant to stand seised to uses; and (3) An appointment under a power. Thus, if a person having a power of appointment over land appoints to "A. to the use of B.," here A. has the legal estate, and B. the equitable.

ALEXANDER v. ALEXANDER.

(*Lead. Cas. Conv.* 395.)
(2 *Ves.* 640.)

Here, under a power to appoint amongst children, the appointor had appointed part to children, and part to grandchildren.

Decided:—That the appointment to grandchildren was bad; but that a power may be good in part, and bad in part, the excess only being void, where the execution is complete and the bounds between it and the excess clear.

TOLLET v. TOLLET.

(2 *Lead. Cas. Eq.* 289.)
(2 *P. Wms.* 489.)

Here a husband had a power to make a jointure to his wife by deed, and he did it by will, and she had no other provision.

Decided:—That Equity will make this defective execution good; but that it will not assist in the case of non-execution of a power.

ALEYN v. BELCHIER.

(2 *Lead. Cas. Eq.* 308.)
(1 *Eden*, 132.)

Here a power of jointuring was executed in favour of a wife, but with an agreement that the wife should only

receive a part as an annuity for her own benefit, and that the residue should be applied to the payment of the husband's debts.

Decided:—That this was a fraud upon the power, and the execution was set aside, except so far as related to the annuity, the bill containing a submission to pay it, and only seeking relief against the other objects of the appointment.

TOPHAM v. DUKE OF PORTLAND.

(1 *De G. J. & S.* 517.)

Here the donee of a power, appointing portions in pursuance thereof, appointed a double share to one of the objects of the power without any previous communication with him, but the instructions with reference to such double share were that half should be held upon a certain trust; and soon after the appointment the appointee executed a deed settling the moiety accordingly.

Decided:—That the purpose of the appointment as to the moiety, though uncommunicated, vitiated it as to that portion, but as to that portion only. The rights of persons entitled in default of appointment under a power can be defeated only by its *bonâ fide* exercise.

Notes on these four Cases.—These cases are here placed together for convenience, as all bearing on the same general subject, the first as to the result of an excessive execution of a power, the second as showing that Equity will assist in the case of defective execution of a power, and the remaining two

as being both leading authorities as to what acts will be considered frauds upon powers.

With regard to the first case given—viz., that of *Alexander* v. *Alexander*—it has been decided, upon the principle of *cy près*, that where a power of appointing land, or money to be laid out in land, is given in favour of children, and the power is exercised by will in favour of a child for life with remainder to the children of such child in tail, here the Court will give an estate tail to the child to whom only a life estate is given by the will. This, however, has no application to personalty not directed to be laid out in the purchase of land, and it only applies to wills. (Sugden on Powers, 8th edit. 498–503.)

With regard to the defective execution of a power, relief will be given in Equity in favour of any of the following:—(1) A charity; (2) A purchaser; (3) A creditor; (4) An *intended* husband; (5) A wife; (6) A legitimate child; where in each case the defect is not of the very essence of the power. Notwithstanding the decision in *Tollet* v. *Tollet*, that relief will not be given in the case of non-execution of a power, there are two cases in which such relief will be given—viz. (1) Where the execution has been prevented by fraud; and (2) Where the power is coupled with a trust; and an instance of the latter exception appears in the case of *Harding* v. *Glynn* (*post*, p. 56), though the principal decision in that case was on another point. As an instance of a bare or naked power in respect of which relief will not be given against the non-execution, see also *Re Weeke's Settlement* (1897), (1 Ch. 289; 66 L. J. Ch. 179.)

Powers with regard to land may be described as methods of causing a use with its accompanying estate to spring up at the will of any given person (Wms. Real Property, 18th edit. 356). They have been divided as of three kinds—viz., Appendant, In gross, and Collateral. A power appendant is where the person to whom the power is given has an interest in the estate to which it is annexed; a power in gross is where a person having an interest in the land has power to create an estate therein, but only to take effect after the determination

of his own interest. Powers collateral are those given to persons taking no interest in the land, and are in the nature of trusts, and Equity will give assistance in the case of non-execution of such powers.

Powers may also be divided into General and Special Powers, the former being where there is a general power to appoint in favour of any person, and the latter where the appointment is limited to a particular class; and with regard to this division there is the following important difference as regards the rule against perpetuities (as to which see *post*, p. 22)—viz., general powers having no tendency to perpetuity, the time of vesting is reckoned, not from the creation, but from the execution of the power; but special powers having such a tendency, the time of vesting runs from the instrument creating the power (1 Sugd. Powers, 8th edit. 394–397).

Upon the subject of Powers it may be well to notice the law as to Illusory appointments as appertaining closely to frauds upon powers. An Illusory appointment is where a person having a power to appoint amongst a certain class, appoints to all the members of such class, but only giving nominal shares to one or more members. An Illusory appointment was originally valid at Law, but not in Equity, on the ground that such an appointment was not an execution of the power *bonâ fide* for the end intended by the donor; but by the 1 Will. 4, c. 46, it was provided that an Illusory appointment should be valid and effectual in Equity as well as at Law. And now the Powers Amendment Act, 1874 (37 & 38 Vict. c. 37), has carried the matter still further, providing that no appointment shall be invalid merely on the ground that any object of the power has been altogether excluded, unless indeed the instrument creating the power expressly declares the amount or the share of any object of the power, or that any object of the power is not to be excluded.

The Conveyancing Acts, 1881 (44 & 45 Vict. c. 41, sect. 52), now provides that a person to whom any power is given, whether coupled with an interest or not, may by deed release or contract not to exercise it. The Conveyancing Act, 1882

(45 & 46 Vict. c. 39, sect. 6), also provides that any such person may disclaim a power, and thereafter shall become incapable of exercising it or joining in its exercise, and that on such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given unless the contrary is expressed in the instrument creating the power. Both of these enactments are retrospective. Trustees cannot, under these provisions, release powers which are coupled with a duty, and when a power is of such a nature as to imply a personal confidence in the particular individual, such trustees can neither release nor disclaim. (See 2 Wh. & Tu. 329, 330; *Re Somes* (1896), 1 Ch. 250; 65 L. J. Ch. 262.)

CADELL v. PALMER.

(*Lead. Cas. Conv.* 424.)
(1 *Clark & Finelly*, 372.)

Decided:—That a limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years as a term in gross, and without reference to the infancy of any person, is a valid limitation; a period for gestation to be allowed in those cases in which it actually exists, but not otherwise.

GRIFFITHS v. VERE.

(*Lead. Cas. Conv.* 497.)
(9 *Ves.* 127.)

Decided:—That a trust by will for accumulation during a life, contrary to the Thellusson Act (39 & 40 Geo. 3, c. 98), is good for twenty-one years by that statute.

Notes on these two Cases.—In *Cadell* v. *Palmer* the limit of the rule against perpetuities was finally ascertained and marked out, and no limitation will be held good which under any possible event may exceed its limit, except that no period is too remote for the limitation of an executory estate or interest engrafted on an estate tail previously limited, the reason being that it is always liable to be barred by the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the absolute ownership of the property so as to effect a perpetuity. (Goodeve's Modern Law of R. P., 4th edit. 287.) Any limitations dependent or expectant on a prior limitation which is void for remoteness, are invalid, because

they are not intended to take effect until the prior limitation is exhausted; but this rule does not apply to limitations in default of appointment, provided it is the intention of the settlor that they shall take effect unless effectually displaced by the exercise of such power, since if the power is invalid by reason of the perpetuity rule they cannot be displaced. (*Re Abbott, Peacock* v. *Frigout* (1893), 1 Ch. 54; 62 L. J. Ch. 46.) By the Conveyancing Act, 1882 (45 & 46 Vict. c. 39, sect. 10), it is provided that where in any instrument coming into operation after December 31, 1882, an executory limitation is created in default or failure of the issue of a person to whom an estate is given, that executory limitation shall become void and incapable of taking effect if and as soon as there is living any issue who has attained the age of twenty-one years. Thus, if an estate is devised to A., "but if he shall die without issue, to B.," A., under 1 Vict. c. 26 (sect. 29), takes a fee simple, subject to any executory devise over to B.; but directly A. has a child who attains the age of twenty-one years, the executory limitation over is at an end, and A.'s estate is absolute and indefeasible. (As to the difference to be observed between a general and a special power as regards the rule against perpetuities, see *ante*, p. 20.)

The accumulation of the income of property, and the suspension of all enjoyment of it, might formerly be directed for the same period as the suspension of its alienation or vesting; but in consequence of the extraordinary will of Mr. Thellusson, which provided for the accumulation of the income of his property for a long period, but yet kept strictly within the time allowed for the creation of executory interests, the Accumulation Act, 1800 (39 & 40 Geo. 3, c. 98), commonly known as "The Thellusson Act," was passed. This statute forbids the accumulation of income for any longer than one of the following periods—viz. (1) The life or lives of the grantor or grantors, settlor or settlors; or (2) The term of twenty-one years from the death of any such grantor, settlor, devisor, or testator; or (3) During the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of

the death of such grantor, devisor, or testator; or (4) During the minority or respective minorities only of any person or persons who, under the deed, surrender, will, or other assurance directing such accumulation, would for the time being, if of full age, be entitled to the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated. *Griffiths* v. *Vere* is the leading case upon the construction of this statute, and shows that, although the trust for accumulation may exceed the periods allowed by this statute, yet it may be good for twenty-one years. This case should, however, be considered together with *Re Errington*, *Errington* v. *Errington* (76 L. T. 616) where it was laid down that where a direction to accumulate income exceeds the Act, and it is necessary to consider for what period the accumulation is good, that period mentioned in the Act which actually fits the intentions declared in the settlement must be chosen, and the direction is void for anything beyond it. The period for which the accumulation is to be held good is not necessarily the longest possible period permitted by the Act. But it is important to remember that if a direction to accumulate income exceeds the limit allowed for the creation of executory interests, it is altogether void, and *not* good even for the twenty-one years. The reason is, that this would have been so before the 39 & 40 Geo. 3, c. 98, and that statute is not an enabling, but a restraining Act only.

Section 2 of 39 & 40 Geo. 3, c. 98, provides that nothing therein contained shall extend to (1) any provision for payment of debts, or (2) any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise; or (3) any direction touching the produce of timber or wood upon any lands or tenements. Therefore in these cases accumulation may be directed as if the Act had not been passed.

A further restriction has been placed on the accumulation of income by the Accumulations Act, 1892 (55 & 56 Vict. c. 58), which provides that no person shall after this Act (28th June 1892)

settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated *for the purchase of land only*, for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation would, for the time being, if of full age, be entitled to receive the income so directed to be accumulated.

In every case in which an accumulation is directed contrary to the above-mentioned Acts, the direction is null and void for the excess, and the rents and profits, so long as they are directed to be accumulated contrary to the provisions of the Acts, go to such person or persons as would have been entitled thereto if such accumulation had not been directed; which does *not* mean that it will go to the person entitled after the accumulation unless otherwise entitled. This is well shown by the case of *Weatherall* v. *Thornburgh* (L. R. 8 Ch. D. 261; 47 L. J. Ch. 658), where a man devised an estate to trustees in trust for his wife for life or until second marriage, and in case of second marriage directed the income to be accumulated during the remainder of her life, and then gave the remainder with accumulations after her death to a stranger. This clearly exceeded the period allowed by the Act, and the accumulative direction was therefore void in respect of any excess over twenty-one years from the testator's death. The widow married again, and it was held that there was an intestacy as to the accumulations during the period between twenty-one years from the testator's death and the death of his widow, and that his heir took for the rest of the life of the testator's wife. See also *Re Parry*, *Powell* v. *Parry* (60 L. T. 489).

By 40 & 41 Vict. c. 33, certain limitations which might have failed as contingent remainders are to take effect as executory interests. This statute enacts as follows: "Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, *which would have been valid as a springing or shifting use or executory devise or other limitation*,

had it not had a sufficient estate to support it as a contingent remainder, shall in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." The words italicised in this enactment should be carefully noticed, and the effect of the enactment may be thus instanced:—Devise "to A. for life and then to his first son who shall attain twenty-one years." This is a limitation good either as a contingent remainder or an executory interest. If when A. dies he has a son aged twenty-one, it will take effect as a remainder; but if, though he has a son, such son has not yet attained twenty-one, though failing as a contingent remainder, the statute preserves it as an executory interest. But suppose the limitation were "to A. for life, and then to his first son who shall attain twenty-five years": this is quite good as a contingent remainder, and the son will take if he is twenty-five at A.'s decease; but suppose he is not, then it fails as a contingent remainder, and the above statute cannot preserve it, for it is a void limitation as an executory interest.

The old real property rule prohibiting a legal limitation of an estate to the issue of an unborn person, has not been abrogated or superseded by, or merged in the more modern rule against perpetuities, but the two rules are independent and co-existing rules. Consequently, a limitation offending against the old rule is not validated by the fact that it is so framed as necessarily to take effect within the period of a life or lives in being and twenty-one years afterwards. (*Whitby* v. *Mitchell*, 44 Ch. D. 85; 59 L. J. Ch. 485.) In the case of *Frost* v. *Frost* (43 Ch. D. 246; 59 L. J. Ch. 118), a testator gave freeholds to trustees to the use of his daughter for life for her separate use, and on her death to the use of any husband she might thereafter marry, and after the death of the survivor of them, to the use of the children of his daughter as she should appoint, and in default of appointment to the use of the children of his daughter living at the death of such survivor, or

previously dead leaving issue then living, and if there should be no such child then he gave remainders over. The daughter, after the testator's death, married a person living at the testator's death, and died without having had issue. It was held that the limitations in default of appointment after the death of the survivor of the daughter and her husband were void for remoteness, either as exceeding the perpetuity rule, or as being contrary to the old rule as regards contingent remainders. Now, observe here that the daughter was not married at the testator's death, and that, though she did in fact marry a person living at the testator's death, yet she *might* have married a person who was not then born, and it might therefore have been a limitation to the daughter for life, then to an unborn person (her husband), and then to his children. This would be a limitation to the child of an unborn person, and void under *Whitby* v. *Mitchell* (*ante* p. 26). Again, the limitation might possibly have exceeded the perpetuity rule as laid down in *Cadell* v. *Palmer*, and therefore, looked at in either light, the limitation would equally be bad. Summarising *Whitby* v. *Mitchell* and *Frost* v. *Frost*, it may shortly be stated that there are two distinct rules, one applicable to remainders, and the other applicable to executory interests, and that, notwithstanding this, if a limitation, though by way of remainder, has any tendency to perpetuity, it is void.

Charities are not subject to the perpetuity rule, for necessarily in many gifts to charities perpetuity is intended. The rule against perpetuities does not also prevent a transfer on a specified event from one charity to another (*Christ's Hospital* v. *Grainger*, 1 M. & G. 460); but though this is so, if there is a gift to a charity for ever, with a gift over to a private person on an event which may not happen with the period allowed by the perpetuity rule, such gift over is void (*Re Bowen*, *Lloyd-Phillips* v. *Davis* (1893), 2 Ch. 491; 62 L. J. Ch. 681).

CORBYN v. FRENCH.

(*Lead. Cas. Conv.* 519.)
(4 *Ves.* 418.)

John Brown by his will bequeathed £500 to the trustees of a chapel, to be applied by them towards the discharge of a mortgage on the said chapel.

Decided:—That this legacy was void under 9 Geo. 2, c. 36.

Notes.—Statutes of Mortmain have been passed from very early times, their policy being to protect the interests of the feudal lords, the earlier enactments being Magna Charta, which prohibited alienation in Mortmain, and the statute *De Religiosis* (7 Ed. 1, stat. 2), still further prohibiting evasions of the prior enactment. The ingenuity of ecclesiastics still triumphed, however, by the idea of Uses, a device only defeated by 15 Rich. 2, c. 5, which statute also applied the doctrine to corporations generally.

But the Crown has almost from time immemorial had the power, as part of its prerogative, to grant licences to hold land in Mortmain, and charters of incorporation usually contain such powers. Similar powers may also be given by statute—as for example, is the case with regard to joint stock companies (25 & 26 Vict. c. 89). Land cannot, even at the present day, be assured to or for the benefit of, or be acquired by or on behalf of any corporation (except for the purposes of a park, museum, or school-house, or providing dwellings for the working classes in populous places) without a licence or a statutory power, and if land is assured to a corporation not having a licence or statutory power to hold land it is forfeited, usually to the Crown, but sometimes to a mesne lord (51 & 52 Vict. c. 42, sect. 1; 53 & 54 Vict. c. 16).

The statute formerly known as the Mortmain Act is the one referred to in the above decision—viz., statute 9 Geo. 2,

c. 36—but that statute and the various amendments thereof, and generally all the former statutes relating to the subject, were repealed by the Mortmain Act, 1888 (51 & 52 Vict. c. 42). Under that statute (sect. 4) every assurance of land or personal estate to be laid out in the purchase of land to or for the benefit of a charity, is to be void unless the various provisions of the Act are observed. These provisions are that any such assurance must be made to take effect for the charity in possession immediately, without power of revocation or reservation, condition, or proviso, subject to this, that it may contain any of the following provisions if the same benefits are reserved to persons claiming under the grantor as to the grantor himself—viz., the reservation of a nominal rent, or of mines, or easements, covenants as to the erection, repair, position, &c., of buildings, and a right of re-entry on breach of covenants or provisions. The assurance must (except as regards copyhold land or stock in the public funds) be by deed executed in the presence of two witnesses, and must be executed twelve months before the death of the grantor, and if it is of stock, such stock must be transferred six months before death. The provisions with regard to execution twelve months before death, and transfer of stock six months before death, do not, however, apply to assurances for valuable consideration, and such consideration may consist of a rent or other annual payment. All assurances (other than of stock in the public funds) must be enrolled in the central office within six months of execution. Gifts to the Universities of Oxford, Cambridge, London, Durham, and also to the Victoria University, or for the colleges of Eton, Winchester, and Westminster, for the better support of the scholars upon the foundation of such colleges, or for the benefit of Keble College, are excepted from the before-mentioned provisions, and so also are assurances for valuable consideration not exceeding two acres to a trustee for any society for religious purposes, or for the promotion of education, art, literature, or science, for the purpose of erection of some building thereon for such purpose, or on which such a building has been erected (sect. 7).

It must be specially observed, however, that the foregoing provisions as to the formalities to be observed in assurances to charities, do not apply to assurances for the benefit of public parks, elementary schools, or public museums, the Mortmain Act, 1888 (sect. 6), providing that a disposition for these purposes may be by deed or will, and must instead (unless made for valuable consideration) be executed twelve months before death, and be enrolled with the Charity Commissioners within six months of the execution of the deed, or in the case of a will, of the testator's death. Dispositions by will must not, however, exceed twenty acres for a park, two acres for a museum, and one acre for a school-house. A will, though not executed twelve months before the testator's death, will be good if it be a reproduction in substance of a previous will in force at the time of such reproduction, and which was executed twelve months before death.

Further, it has been provided by the Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16), that the foregoing general provisions of the Mortmain Act, 1888, are not to apply to assurances by deed, or will, of land or personal estate to be laid out in land for the purpose of providing dwellings for the working classes in any "populous place" (as defined by the Act), but any deed must within six months of execution, and any will within six months of probate, be enrolled with the Charity Commissioners, and a disposition by will must not exceed five acres.

A bequest, therefore, of anything that could be construed as an interest in land was, subject to the above exceptions, void under the Mortmain Act—*e.g.*, a gift of money owing on mortgage of land. And if any charitable legacies were made payable out of property which could not be lawfully given to a charity, they failed to that extent, and the Court would not marshal assets in favour of a charity (see Indermaur's Manual of Equity, 4th edit. 136, 137). But the Mortmain Act, 1891 (54 & 55 Vict. c. 73) made a great change in the law with regard to gifts by will to charities. This statute applies to the wills of all testators dying after August 5, 1891, and it provides

that land may be given by will to any charitable use or purpose, subject to this, that such land must be sold within one year from the testator's death, or such further time as the High Court or a Judge at Chambers, or the Charity Commissioners allow, and that if the sale is not completed within the time allowed, the land is to vest forthwith in the official trustee of charity lands, and the Charity Commissioners must enforce the sale thereof. It also provides that personal estate directed by will to be laid out in the purchase of land to or for the benefit of any charitable use, shall be held for the charitable use, as if the will contained no direction to lay it out in the purchase of land. In certain cases, however, the charity may be permitted to actually hold the land itself, it being provided that when it is necessary for actual occupation for the purposes of the charity, the High Court or a Judge at Chambers, or the Charity Commissioners, may sanction the retention of land devised to a charity, or the purchase of land with money directed by a will to be laid out in land. The law, therefore, now may be stated, generally, to be that if it is desired to give land to a charity in such a way that it undoubtedly may be held by the charity, the formalities of the Mortmain Act, 1888, must still be observed, but that, notwithstanding this, the substantial benefit of land may be given by will; the land will probably have to be sold, but that is all. The old doctrine of the Court, therefore, as to not marshalling assets in favour of a charity is now of no practical importance, and in giving a charitable legacy it is no longer necessary to direct the bequest to be paid solely out of pure personalty, as was formerly the case.

As to what are charitable trusts, see 43 Eliz. c. 4 and *Re Foveaux*, *Cross* v. *London Antivivisection Society* ((1895), 2 Ch. 501; 64 L. J. Ch. 856). Charitable trusts must not be confounded with superstitious uses or trusts which are void by Common Law (see *Re Vaughan*, *Vaughan* v. *Thomas*, 33 Ch. D. 187; 35 W. R. 104; *Brown* v. *Burdett*, 21 Ch. D. 667; 52 L. J. Ch. 52; see further, Indermaur's Manual of Eq. 4th edit. 57, 58).

SHELLEY'S CASE.

(*Lead. Cas. Conv.* 589).
(1 *Co.* 93 *b.*)

Decided:—That where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs or the heirs of his body, the word "heirs" is a word of limitation and not of purchase; so that the ancestor takes the whole estate comprised in the term; that is to say, in the first case, an estate in fee simple; in the second, an estate in fee tail.

Notes.—The above "Rule in *Shelley's Case*" applies to equitable as well as legal estates; but where one limitation is legal and the other equitable it does *not* apply. Thus, a grant unto and to the use of A. for life, with remainder to the heirs, or heirs of the body, of A., gives A. a fee simple or fee tail as the case may be, and if an intermediate estate to a third party were given after the life estate to A., and before the limitation to his heirs or heirs of the body, the result would be the same, subject to the intervening estate; but if the grant is unto and to the use of A. for life, with remainder to the use of B. and his heirs in trust for the heirs or heirs of the body of A., here A. would take but a life estate, and his heir or heir of the body would take as a purchaser.

The meaning of the rule is simple and apparent enough—viz., that where there is a gift to a person and his heirs, or the heirs of his body, it is not to be taken as conferring any estate on the heir, but simply showing, or marking out, the estate that the ancestor takes. And this is so although there may be an intervening estate between the gift of freehold to

the ancestor and the subsequent limitation to the heirs. The rule is of very ancient origin, and the recent case of *Van Grutten* v. *Foxwell* (66 L. J. Q. B. 745) furnishes an illustration of its application. The origin and history of the rule was examined in this case by Lord Macnaghten, who said: "The better view seems to be that it is a rule of tenure founded on feudal principles, and that its purpose was to prevent the lord being defrauded of the chief fruits of seignory."

The rule in *Shelley's Case* has, of course, no application to personal property, but with regard to personal property a rule has sprung up similar to it: thus, if personalty is settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns, A. will simply be entitled absolutely. There cannot in fact be estates in personal property, and the only exception is a bequest of a term of years to one for life and then to another, which is allowed. The only course is to vest the property in trustees on trust. If leaseholds were settled simply on trusts to correspond with the uses of freeholds in a strict settlement, the result would be that they would vest absolutely in the first tenant in tail immediately upon his birth. This is usually avoided in practice by means of a trust for sale and for reinvestment in the purchase of freeholds, to be settled on the same uses as the settled freeholds, with power to postpone the sale, and a direction that the rents and enjoyment until sale shall belong to the persons who would be entitled to the rents of the substituted freeholds; or as regards personalty generally, it may be vested in trustees upon trust to correspond with the uses of the freeholds, postponing the period of vesting until the first tenant in tail by purchase attains twenty-one, a limitation which is necessary to prevent a possible infringement of the rule against perpetuities (Goodeve's Modern Law of R. P., 4th edit. 79, 80; see also notes to *Leventhorpe* v. *Ashbie*, *post*, p. 40).

WILD'S CASE.

(*Lead. Cas. Conv.* 669.)
(6 *Co.* 16 *b.*)

Decided:—That where there is a devise to a person and his children or issue, and he has no issue at the time of the devise, there such person will take an estate tail; but if he has issue at the time, he and his children take joint estates.

Notes.—This decision is known as the "Rule in *Wild's Case*," and the reason of it is, that as the devisor evidently intended that the devisee's children should take, and they cannot take as immediate devisees, for they are not in existence, nor by way of remainder, because that was not intended, the words shall be taken as words of limitation.

However, the rule in *Wild's Case* is of a flexible character, and will yield to a contrary intention appearing upon the face of the will. As an instance of this may be taken the case of *Grieve* v. *Grieve* (L. R. 4 Eq. 180; 36 L. J. Ch. 932). There a testator devised a house to his nieces and to their children, and if they had not any, then to their brother William and his children; the furniture to go with the house. Neither of the nieces had a child at the date of the will, and it was held that the rule in *Wild's Case* being flexible, and yielding to the intention of the testator, the nieces took the house and furniture for their lives, with immediate remainders to the children of each coming into existence during the lives of the nieces. The following extract from the judgment shows the principle on which this decision was based: "By giving an estate tail the testator's intention would be defeated. The rule in *Wild's Case* may be departed from, and in this case the direction that the furniture shall go with the house appears to me to be sufficient reason for not giving estates tail. The

devise of the house and the gift of the furniture must be taken together, and by holding that the children take as purchasers, the intention of the testatrix will be carried out as far as is consistent with the rules of law." See also *Re Wilmot*, *Wilmot* v. *Betterton* (76 L. T. 415; 45 W. R. 492). The rule in *Wild's Case* does not apply to personalty (*Audsley* v. *Horn*, 29 L. J. Ch. 201), and under a gift of personalty to A. and his children, whether he has any or not at the time, it is a joint tenancy amongst them all, unless the context leads to the conclusion that A. was meant to take for life, with remainder to his children (*Newill* v. *Newill*, 41 L. J. Ch. 432.

GARDNER v. SHELDON.

(*Lead Cas. Conv.* 625.)
(*Vaughan*, 259.)

Decided:—That a devise to B. after the death of A. gives A. an estate for life by implication *if B. be heir-at-law* of the testator; but no estate if he be not heir-at-law.

An heir-at-law cannot be disinherited except by necessary implication.

Notes.—The reason of the above decision is, that if B. is not the heir-at-law, it might possibly be considered that the testator intended that during A.'s life the property should descend to his heir-at-law; but if the subsequent devise be to the heir-at-law, it could not be so considered. However, even in this case no estate by implication will arise if there be a residuary devise, for then it would be considered that the residuary devisee was intended to take.

An estate by implication of law takes place only in limitations of uses, either by assurances operating merely by the statute, or by the medium of a conveyance to serve the uses, and in dispositions by will; for as is indeed laid down by the above case, "the law (that is the Common Law) does not in *conveyances* of estates admit of estates to pass by implication regularly, as being a way of passing estates not agreeable to the plainness required by law in transferring estates from one to another." (Leading Cases Conv. 640.)

On the same principle cross-remainders cannot be implied in a deed, but in a will they may be raised by implication, on the ground that the testator being *inops concilii*, by construction his words ought to be made to answer his intent appearing in other parts of his will as nearly as may be. Thus, if Blackacre is devised to A. in tail, and Whiteacre is devised to B. in tail, and if they both die without issue, to C., here A. and B. have

cross-remainders by implication, and if A. dies first, without issue, Blackacre goes to B., and if B. dies first, without issue, Whiteacre goes to A., C.'s remainder being postponed until the issue of both fail (1 Stephen's Com. 12th edit. 555).

Cross-remainders may be defined as a reciprocal contingency of succession, arising on a grant of land, to two or more as tenants in common, each having a remainder over in the other's share.

VINER v. FRANCIS.

(*Lead. Cas. Conv.* 798.)
(2 *Cox*, 190.)

Here a testator bequeathed unto the children of his late sister the sum of £2000, to be equally divided among them, and the question was, what children should take?

Decided:—That those children should take who were living at the death of the testator.

Notes.—It may be useful here to state shortly the rules for construction of testamentary gifts to children:—

(1) That an immediate gift to children, whether of a living or a deceased person, comprehends all those living at testator's death, and those only.

(2) That where a particular interest is carved out, with a gift over to the children of any person, such gift will embrace not only those living at the testator's death, but all who come into existence before the period of distribution.

(3) That where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to all who come into existence before the first child attains that age, but only to those. (See *Gimblett* v. *Purton*, L. R. 12 Eq. 427; 40 L. J. Ch. 556; *Re Gardiner's Estate*, L. R. 20 Eq. 647.) This rule is not, however, applicable to bequests of income similarly distributable. (*Re Wenmoth's Estate*, *Wenmoth* v. *Wenmoth*, 27 Ch. D. 266; 57 L. J. Ch. 649.)

(4) That where there is an immediate gift to children by will, and at the period when distribution takes place there are no children in existence, all the children born at any future period will take.

(5) The words "to be born" will have the effect of extending

the gift to all the children who shall ever come into existence. (2 Jarman on Wills, 4th edit. 154–167.)

With regard to the third rule given above, it must be remembered that it is a rule of convenience, and that as there is much injustice in excluding, for the mere sake of the convenience of others, those children born after the eldest one of them attains the given age, the Court is not inclined to extend the operation of the rule. (Lead. Cas. Conv. 805.) This is shown by the recent case of *Re Wenmoth's Estate*, *Wenmoth* v. *Wenmoth* (*ante*, p. 38), where the Court held that a distinction ought to be made between gifts of *corpus* and gifts of income, there being nothing which required the rule to be applied to income, as no difficulty with regard to that could arise, as might with regard to *corpus*.

LEVENTHORPE v. ASHBIE.

(*Lead. Cas. Conv.* 861.)
(*Rolle's Abr.* 831, *pl.* 1.)

A. devised a term of years to B. and the heirs male of his body begotten.

Decided:—That B. was absolutely entitled to the term, and that on his death it went to his executors.

Notes.—It is now well established, in accordance with the above case, that a bequest to a person of chattels, whether real or personal, in such terms as would in the case of a devise of real estate have conferred upon him an estate tail, will, as a general rule, give him an absolute interest, which on his death will go, not to his heir in tail, but to his personal representative. There can, indeed, be no estates in personal property, for such property is essentially the subject of absolute ownership; and besides the fact of a grant to one and the heirs of his body, conferring an absolute interest, so even if any chattel be assigned to one for his life, that person will at once become entitled at law to the whole, and this would be so even were the chattel a term of years of any length.

To this rule there is an exception in the case of a bequest of a term of years to one for life, for on the death of the legatee for life the term is held to shift away and to vest in the person next entitled by way of executory bequest; and although the above-mentioned strict doctrine of the indivisibility of chattels was retained in the Courts of Law, yet in modern times it was not observed in Equity, for the object there has always been to carry out the intention of the parties; and if a chattel is given to A. for life, and afterwards to B., B. has a vested interest in remainder, which he may dispose of at pleasure; and if movable goods were thus given, the Court would compel the life owner to furnish and sign an inventory of the goods and

undertake to take proper care of them. With regard to this difference between Law and Equity, the student will remember that the rules of Equity now prevail. (Judicature Act, 1873, sect. 25, sub-sect. 11.) However, if a gift is made of articles *quæ ipso usu consumuntur*, as wines, &c., this will always vest in the first donee the absolute interest (see also herein notes to *Shelley's Case*, *ante*, pp. 32, 33). In one case (which is, however, clearly distinguishable from the statement just made), a testator directed that the tenant for life of a house should have as much of his wine as she required for consumption in the house, and that any wine not so consumed on the death of the tenant for life should go with the house to the devisee in remainder. It was held that the tenant for life had only been given so much of the wine as she could use during her life, and that she was not entitled to sell any of the wine. (*Re Colyer*, *Milliken* v. *Snelling*, 55 L. T. 344.)

With regard to a gift of personalty to one for life and then to another, such a gift of specific personalty must be distinguished from a gift as a whole or as a residue. (As to the rule in that case, see *Howe* v. *Earl of Dartmouth*, *post*, p. 129.)

It may be convenient to here refer to a personal annuity, which, though personal property, is yet the subject of certain peculiarities. A personal annuity consists of an annual payment not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body, of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and therefore incapable of assignment, but this objection has been long overruled. When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property, and will pass by his will under a bequest of all his personal estate. When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail, for this kind of inheritance is not a tenement within the meaning of the statute *de Donis*. The grantee has merely a fee simple, conditional on his merely having issue, such as a grantee of lands would have had under a similar grant prior to the statute *de Donis*,

or as a copyholder would now take in manors where there is no custom to entail. When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment, but should he die without issue the annuity will fail. A personal annuity given to a man for ever will devolve on the executor, and not on the heir of the grantee. (Williams' Personal Property, 14th edit. 268, 269.)

ELLIOTT v. DAVENPORT.

(*Lead. Cas. Conv.* 902.)
(1 *P. Wms.* 83.)

Testatrix by her will bequeathed unto Sir William Elliott, his executors, administrators, and assigns, the sum of £400 which he owed her, provided that he should thereout pay several sums to his children; and she directed her executors to deliver up the security and not to claim any part of the debt, but to give such release as the said Sir William Elliott should think fit. Sir William Elliott died in the lifetime of testatrix.

Decided:—That this was a lapsed legacy; and it was admitted on both sides, and agreed to by the Court, that the mere addition of the words "executors, administrators, and assigns" will not prevent a lapse, for they are but surplusage.

Notes.—The same doctrine applies to a limitation to a man "and his heirs." A mere declaration that a gift shall not lapse will have no effect if there be no substitution for the person dying in testator's lifetime; *but if, together with such a declaration*, the gift is to a person and his executors, &c., this will prevent a lapse. The intention of substitution also will be implied, and a lapse thus prevented, where there is a gift to a person "*or*" his personal representatives.

It must be borne in mind that by 1 Vict. c. 26 (sects. 32 and 33) no lapse is to occur (1) in the case of the devise of an estate tail where any issue are living at testator's death who would be inheritable under such entail, and (2) in the case of a devise or bequest to a child or other issue of the testator who dies leaving issue living at testator's death.

With regard to this second case, the effect of the provision is not necessarily to make the child of the deceased child take, but to render the subject of the devise or bequest the absolute property of the deceased devisee or legatee. The effect of the provision is well shown by two cases—viz., *Eager* v. *Furnivall* (L. R. 17 Ch. D. 115; 50 L. J. Ch. 537) and *Re Hensler*, *Jones* v. *Hensler* (L. R. 19 Ch. D. 612; 51 L. J. Ch. 303). In this latter case a testator devised property to his son, who died during his lifetime, leaving issue, and having devised all his real estate to his father, the testator. It was held that the son took the property under the 33rd section of the Wills Act, as he must by force of that provision be deemed to have survived his father, and on this principle, that though his father actually survived him, yet he must be deemed to have died before him, so that the devise in the son's will failed, and the estate went to the son's heir, who of course was his child; but this child took, not under the 33rd section, but by force of his position as heir to property to which his father was by reason of that section absolutely entitled.

No point as to lapse arises if there is a bequest or devise to two or more as joint tenants and one predeceases the testator, for the survivor or survivors take the whole (Jarman on Wills, 4th edit. vol. i. 340). And the 33rd section of the Wills Act does not apply to prevent a lapse in cases of gifts to a class; thus, if a father gives £10,000 "equally between my children," and then a child dies leaving issue, nevertheless this enures for the benefit of the other children, and a lapse of the share of the deceased child is not prevented. (*Brown* v. *Hammond*, 1 Johns. 210.)

Property comprised in a lapsed devise or bequest falls into the residue if the will contains a residuary clause, and if it does not it goes to the heir or next of kin, according to whether it is real or personal property.

The student must be careful not to confuse a lapse with the subject of ademption of a legacy. By the ademption of a legacy is meant the failure of a specific legacy by the disposal of the subject-matter of it during the testator's lifetime. A

mere pledge of the subject of the legacy will not amount to an ademption, and the legatee is entitled to have the amount for which it is pledged discharged out of the testator's general estate (*Knight* v. *Davis*, 3 Myl. & K. 358). There is no ademption of a demonstrative legacy, for if the specified fund ceases to exist, the legacy then takes effect out of the general estate. (See also as to the doctrine of ademption or satisfaction, *post*, pp. 133–136.)

LORD BRAYBROKE v. INSKIP.

(*Lead. Cas. Conv.* 986.)
(8 *Ves.* 417.)

Decided:—That by a devise in general terms a trust estate will pass, unless an intention to the contrary can be inferred from expressions in the will, or the purposes or objects of the testator.

Notes.—This decision must be taken as originally establishing the rule, not only as to ordinary trust estates, but also as to mortgaged estates—viz., that they would all pass under a general devise unless there were a contrary intention; and with regard to what would amount to such a contrary intention, if a testator charged the property comprised in the residuary devise with debts, legacies, or annuities, or otherwise, or subjected his residuary estate to a series of complicated limitations, this being incompatible and inconsistent with his duties or powers in dealing with either trust or mortgaged estates, was held to show a contrary intention, and prevent the trust or mortgaged estates passing.

A constructive trust was held to pass equally with an express trust under a general devise, provided there was no contrary intention; and it was also decided that under a general devise of *trust* estates, an estate of which testator was only constructive trustee would pass (*Lysaght* v. *Edwards*, L. R. 2 Ch. D. 490; 45 L. J. Ch. 554). In that case the facts were as follows: In 1874 the plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will, dated in 1873, given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M., upon trust for sale, and having also devised to H. alone all the real estate which at his death

might be vested in him as trustee. It was held by Jessel, M.R., that the vendor was a constructive trustee of the estate he had contracted to sell, and that it passed to H. under the devise of trust estates.

The above is still the law in the case of deaths prior to January 1, 1882; but with regard to deaths on or since that date, sections 4 and 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), very much alter the position (subject, however, to the Copyhold Act, 1894, presently mentioned). Section 30 of the Conveyancing Act, 1881, dealing with the whole subject of trust and mortgaged estates generally (including copyholds), enacted that any such estates vested solely in any person shall, *notwithstanding any testamentary disposition*, vest absolutely in his personal representatives, so that under this enactment any devise of trust and mortgaged estates became superfluous and of no effect. This enactment comprised all cases, not only of mortgaged estates and estates held upon express trust, but also constructive trust estates, so as to govern such a case as that of *Lysaght* v. *Edwards*, *ante*, p. 46. In addition, section 4 of the Conveyancing Act, 1881, enacts that where at the death of any person there is subsisting a contract enforceable against the heir or devisee, for the sale of a fee simple or other freehold interest descendible to his heirs general in any land, his personal representative shall have power to convey the land, for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

It will be observed that, though section 4 of the Conveyancing Act, 1881, did not apply to copyholds, section 30 did. This, however, was altered, for the Copyhold Act, 1887 (50 & 51 Vict. c. 73, sect. 45), repealed section 30 of the Conveyancing Act, 1881, as regards copyholds; and though this statute is itself repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), that Act (sect. 88) provides that section 30 of the Conveyancing Act, 1881, shall not apply to copyhold or customary land vested in the tenant on the court rolls by way of trust or by way of mortgage; and therefore as regards copyhold trust or mortgaged property that will now pass to the

devisee under the trustee's or mortgagee's will, or if there is no will it will devolve on the customary heir. The doctrine of the principal case, therefore, applies generally as to all deaths prior to January 1, 1882, and also now to all cases of copyhold trust and mortgaged property, but it has no application to freeholds.

With regard to property that will vest in the personal representatives of a deceased person, it appears convenient to here notice the recent enactment of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65, Part I. sects. 1–3) which applies to all deaths occurring on or after January 1, 1898. This statute provides that where real estate (other than copyholds) is vested in any person without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time as if it were a chattel real, and shall be administered by the personal representatives as if it were personalty. Subject to this the personal representatives are to hold the real estate as trustees for the persons beneficially entitled thereto, who may in due course require and compel transfer to them.

PAWLETT v. PAWLETT.

(*Lead. Cas. Conv.* 816.)
(1 *Vern.* 321.)

Lord Pawlett, by settlement, limited certain lands for the purpose (amongst other things) of raising portions for younger children, payable at twenty-one or marriage. One of the daughters died under twenty-one, and unmarried, and her administratrix instituted this suit to obtain payment of her portion.

Decided:—That her portion should not be raised for the benefit of her administratrix, though it would have been otherwise in the case of a legacy.

STAPLETON v. CHEALES.

(*Lead. Cas. Conv.* 820.)
(*Prec. Chan.* 17.)

Decided:—(1) That if a legacy is bequeathed to an infant "payable" or "to be paid" at the age of twenty-one years, it is a vested interest, the time of payment only being postponed, so that it shall go to the personal representatives of the infant, though he dies before that age.

(2) But if a legacy is bequeathed to an infant "at" twenty-one, or "if" or "when" he shall attain the age of twenty-one, this is a contingency, and if the legatee dies before the appointed age the legacy is lapsed, and

shall not go to the personal representatives, *unless interest is given in the meantime.*

HANSON v. GRAHAM.

(*Lead. Cas. Conv.* 822.)
(6 *Ves.* 239.)

Decided:—That the word "when," standing alone and unqualified in a will, is conditional; but that it may be controlled by expressions and circumstances, so as to postpone, *not* the vesting, but the payment only, as where the interest of the legacy in the interval, is directed to be laid out at the discretion of the executors for the benefit of the legatees.

Notes on these three Cases:—"The result of the question whether a gift is vested or contingent is most important; because in the former case, although the devisee or legatee die before the event happens which gives him actual possession or enjoyment, the property devised or bequeathed becomes transmissible to his representatives; whilst, on the other hand, if the gift be contingent upon the happening of a certain event which never takes place, the property will go to others." (Lead. Cas. Conv. 832.)

The case of *Pawlett* v. *Pawlett* goes to shew that, when the beneficiary dies, a portion shall not be raised, though a legacy under similar circumstances would; while the two latter cases shew when it is that a legacy will be considered an actually vested interest, with payment only postponed, and when it will be but a contingency.

The circumstance that a legacy is given for some particular purpose does not render it contingent; thus if a legacy is given to an infant to apprentice him, and he dies before he is apprenticed, his representatives will still get the legacy. (See

hereon the recent case *Re Bowes, Earl of Strathmore* v. *Vane* (1896), 1 Ch. 507; 65 L. J. Ch. 298.)

The student should, in considering the cases of *Stapleton* v. *Cheales* and *Hanson* v. *Graham*, observe that the rules there laid down only apply to purely personal legacies, and not to legacies which are charged on land. As regards legacies charged on land and payable *in futuro*, the rule is that if the postponement is with reference to some event personal to the legatee, then if that event never happens, the legacy is not to be raised; but if the postponement has reference to the circumstances of the estate, then it is otherwise (Indermaur's Manual of Eq., 4th edit. 117, 118).

MORLEY v. BIRD.

(*Lead. Cas. Conv.* 876.)
(3 *Ves.* 629.)

Decided:—That notwithstanding the leaning of the Court to a tenancy in common, in preference to a joint tenancy, an interest simply given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," or words to the like effect, or unless an inference of that sort arises in Equity from the nature of the transaction, as in partnership, &c.

LAKE v. GIBSON.
LAKE v. CRADDOCK.

(2 *Lead. Cas. Eq.* 952.)
(1 *Eq. Cas. Ab.* 294, *pl.* 3.)

Here five persons purchased West Thorock Level from the Commissioners of the Sewers, and the conveyance was to them as joint tenants in fee, but they contributed rateably to the purchase, which was to the intent of draining the level. Several of them died.

Decided:—That they were tenants in common in Equity, for the purchase was for the purpose of a joint undertaking; and though one of these five persons deserted the partnership for thirty years, yet he was afterwards let in on terms.

Notes on these Cases:—The rule at law with regard to two or more persons taking property has always been that they are joint tenants, the maxim being *Jus accrescendi præfertur ultimæ voluntatis,* except indeed in the case of merchants, where there has always been an exception to the rule of survivorship, for *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.*

The above case of *Morley* v. *Bird* decides that where property is given to several without anything else, that must be a joint tenancy; and *Lake* v. *Gibson* and *Lake* v. *Craddock* shew the leaning of Equity to a tenancy in common, and that a purchase for a joint undertaking, though the conveyance be to the parties as joint tenants, will constitute a tenancy in common; and this decision forcibly illustrates the maxim, "Equality is equity." Although, if persons purchase an estate and pay equal portions of the purchase-money, and take a conveyance in their joint names, this is a joint tenancy (unless for the purpose of some joint undertaking), yet if the purchase-money is paid in *un*equal proportions, there will be no survivorship, but they hold the estate in proportion to the sum which each advanced: and in the case of a mortgage to two or more jointly, even though the money is advanced equally, there is no survivorship, but the survivor or survivors will be a trustee or trustees for the personal representatives of the deceased. To prevent the application of this rule it has been the practice, when two or more trustees advance money on mortgage, to insert a declaration in the deed that the money is advanced on a joint account, and that the receipt of the survivor shall be a sufficient discharge; for in this case it would be very inconvenient for the representatives of a deceased trustee to have an interest, and to be necessary parties in reconveying when the mortgage-money is paid off. Although in practice words to this effect are still inserted in such mortgages, yet there is strictly now no need for them, as by section 61 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it is provided that where a mortgage is made to two or more persons jointly,

and not in shares, the mortgage-money shall be deemed to belong to them on a joint account as between them and the mortgagor, and the receipt of the survivor shall be a sufficient discharge, notwithstanding any notice to the payer of a severance of the joint account. This provision, however, only applies to mortgages made on or since January 1, 1882. The purchase by joint mortgagees of the equity of redemption is unlike an ordinary joint purchase, for they will in Equity still be tenants in common, because the purchase is founded on the mortgage.

Notwithstanding the leaning of Equity to a tenancy in common as giving really the true equality, yet if property, instead of having been *purchased* for a partnership, has been devised to the partners as joint tenants, and used by them for partnership purposes, they will still be joint tenants, and not tenants in common, unless by express agreement, or by their course of dealing with it for a long period, an intention to sever the joint tenancy may be inferred (2 Lead. Cas. Eq. 964).

In those cases in which Equity considers a tenancy in common to be created, the survivor is treated as a trustee for the representatives of the deceased person, an implied trust being created founded upon an unexpressed but presumable intention.

With regard to purchases by partners of property for partnership purposes, the usual plan is to take the conveyance to the partners as joint tenants "as part of their partnership property," but it is sometimes conveyed to the partners as tenants in common, in shares corresponding with their shares in the partnership property, without mentioning that it is for partnership purposes. If there are a number of partners it may sometimes be found advisable to vest the property in some of them only, with a separate declaration of trust (1 Prideaux, 16th edit. 272, 274).

It may be noticed that land purchased for the purposes of a partnership has long been considered by the Court to have the quality of personal estate, and this principle is embodied in

the Partnership Act, 1890 (53 & 54 Vict. c. 39), which provides (section 22) that where land or other heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable, and not real or heritable estate.

HARDING v. GLYNN.

(2 *Lead. Cas. Eq.* 335.)
(1 *Atk.* 469.)

A testator by his will gave personal property to his wife, but *did desire her*, at or before her death, to give the same unto and among such of his own relations as she should think most deserving and approve of.

Decided:—That the wife was only intended to take beneficially during her life, and that so much of the property not disposed of in accordance with the power, ought to be divided equally amongst such of the relations of the testator as were his next of kin at the time of his wife's death.

Notes.—In the above case words which merely expressed the wish or desire of the testator were held to constitute a trust; but frequently it is very difficult to determine when and when not a trust will be created by words of that nature. The general rule is, that where property is given absolutely, accompanied with words of recommendation, entreaty, or wish, that the donee will dispose of that property in favour of another, such words shall be held to create a trust; but (1) the words must be so used that upon the whole they ought to be construed as imperative; (2) the subject of the recommendation or wish must be certain; and (3) the objects of the recommendation or wish must be certain. Such trusts are called Precatory Trusts. Words of recommendation, &c., will *not* be construed as imperative if an intention appear in any part of the will to give the devisee a right or power to spend the property.

Precatory trusts come properly under the definition of

Express trusts, these being defined as trusts clearly expressed by the author or creator, or capable of being fairly collected from a written document. They cannot, of course, be said to be clearly expressed, but yet on a correct interpretation of the whole instrument they may fairly be collected from it.

"The cases on the subject of precatory trusts are numerous, and it is difficult, if not impossible, to reconcile all of them, but there is no doubt that the tendency of modern decisions is against construing precatory words as binding trusts, and rather to leave them as a wish or desire, and nothing more." (Indermaur's Manual of Equity, 4th edit. 31; and see *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253; 59 L. T. 884; *Re Hamilton, Trench* v. *Hamilton* (1895), 2 Ch. 370; 64 L. J. Ch. 365.) See also numerous cases referred to, 2 Lead. Cas. Eq. 339).

LORD GLENORCHY v. BOSVILLE.

(*2 Lead. Cas. Eq.* 763.)
(*Cas. temp. Talbot*, 3.)

Here Sir Thomas Pershall devised real estates to trustees upon trust, upon the happening of the marriage of his grand-daughter Arabella Pershall, to convey the said estates with all convenient speed to the use of the said Arabella Pershall for life, remainder to husband for life, remainder to the issue of her body, with remainder over.

Decided:—That though Arabella Pershall would have taken an estate tail had it been the case of an immediate devise, yet that the trust, being executory, was to be executed in a more careful and accurate manner, and that a conveyance to Arabella Pershall for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's intent.

Notes.—The above case clearly shews the distinction between executed and executory trusts. "A trust executed is one which is fully and finally declared by the instrument creating it, one in which the creator of the trust may be said to have been his own conveyancer, but a trust executory is one which, whilst containing an indication or idea of the trust intended, is yet incomplete in its character, and requires some other instrument to perfect it." (Indermaur's Manual of Eq., 4th edit. 43.) The distinction between these two kinds of trusts forms the best illustration that can be given of the true meaning of the maxim, "Equity follows the Law"; for as regards an executed trust, the same construction will be put on it in Equity as at Law; but as regards an executory trust, only where an analogy

plainly subsists, and there is no equitable reason to deviate from the rule. (See *Sackville-West* v. *Viscount Holmsdale*, L. R. 4 H. L. 543.)

A very material distinction should here be noted between trusts executory in marriage articles and trusts executory in wills; for in the former, from the nature of the transaction, the intention of the parties can always be presumed, whilst in the latter it can only be gathered from the words used in the will; and therefore in wills very frequently a construction must be put on such a trust according to the literal meaning, because there is nothing to guide the Court to any other construction; though if the same words had been used in marriage articles, the construction would have been different, the object of the marriage articles forming a guide to the intention. Thus, if in marriage articles an estate is limited to the husband and the heirs of his body, the Court will yet construe this as only giving a life estate to the husband, and an estate tail to the first and other sons, because marriage articles are naturally intended as a provision for the children of the marriage, and to give the husband an estate tail would be to frustrate the very object of the articles, because he might at once bar it. But in the case of a like provision in a will, although in the nature of an executory trust, the husband will take an estate tail, unless some intention can be found from the words used in the will that he is only to take a life estate, for there is nothing from the nature of the instrument, like there is in the case of marriage articles, to shew that he was only intended to take a life estate. (2 Lead. Cas. Eq. 775.)

With regard to marriage articles, it may be observed that, where there are articles entered into before marriage, and after marriage a settlement is executed, and there is a difference between them, the articles govern; but where both the articles and the settlement are made before the marriage, the parties are generally concluded by the settlement, unless it recites that it is made in pursuance of the articles, when, if it differs, it will be made subservient to them (see *Legg* v. *Goldwire*, 2 Lead. Cas. Eq. 770). However, evidence is admissible

to shew that the articles constitute the final agreement between the parties, and that the discrepancy between the articles and the settlement arose from mistake, and upon this being proved the Court will rectify the settlement and make it conformable to the real intention of the parties, but the evidence must be clear, and the onus lies on the party seeking to alter the settlement. (2 Lead. Cas. Eq. 798, 799.)

ELLISON v. ELLISON.

(2 *Lead. Cas. Eq.* 835.)
(6 *Ves.* 656.)

Decided:—That there is this distinction as to volunteers—viz., The assistance of the Court cannot be had, without consideration, to constitute a party *cestui que trust*, as upon a mere voluntary covenant to transfer stock, &c.; but if the legal conveyance is *actually made* constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, &c., though without consideration, the equitable interest will be enforced.

Notes.—A person who makes a voluntary gift by instrument *inter vivos*, must make it in a complete manner to render it binding on him, for if it is in any way incomplete he may draw back from it, and it cannot be enforced (see *Green* v. *Paterson*, 32 Ch. D. 95; 54 L. T. 738). Where, however, a settlor actually constitutes himself a trustee for volunteers, a Court of Equity will enforce the trusts declared; and such cases as these must be carefully distinguished from those in which it is intended to confer upon persons the whole interest without trustees; thus, if a person disposes of property informally in favour of a volunteer, no assistance will be given in Equity, but if he simply declares himself to be a trustee of that property, a complete trust is created, and the Court will act upon it.

An instance of an informal attempt to dispose of an interest is found in the case of *Antrobus* v. *Smith* (12 Ves. 39). In that case one Crawford made the following indorsement upon a receipt for one of the subscriptions in the Forth and Clyde Navigation: "I do hereby assign to my daughter Anna Crawford all my right, title, and interest of and in the enclosed

call, and all other calls of my subscription in the Clyde and Forth Navigation." This was no complete legal assignment, but it was attempted to be argued that the father meant to make himself a trustee for his daughter of these shares. It was, however, held that there was no trust created, the Master of the Rolls saying: "Mr. Crawford was not otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. *He meant a gift.* He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which, in the mode of making, he has left imperfect. There is a *locus pœnitentiæ* as long as it is incomplete."

An instructive case on this subject is that of *Richards* v. *Delbridge* (L. R. 18 Eq. 686), in which Jessel, M.R., held that certain words professing to make a gift (which was an imperfect gift), constituted no valid declaration of trust. The following portion of his Lordship's judgment seems especially useful: "The principle is a very clear one. A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and without any actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equiva-

lent to it, and use expressions which have that meaning; for however anxious the Court may be to carry out a man's intentions, it is not at liberty to construe words otherwise than according to their proper meaning. . . . The true distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise." (See also *Milroy* v. *Lord*, 4 De G. F. & J. 264.)

Where a person makes an assignment of outstanding debts, no doubt notice should always be given to the debtor, but even though the assignment is voluntary, and this notice is not given, yet the assignment is substantially a complete one so as to vest the debts in the assignee; and if the assignor after the assignment receives the amount of the debts, the assignee can sue him for the amount, which after the assignment he had no right to receive. (*Re Patrick, Bills* v. *Tatham*, (1891) 1 Ch. 82; 60 L. J. Ch. 111.)

In the absence of an express power of revocation, a conveyance or a declaration of trust in favour of a volunteer *cannot* be revoked or avoided (*Harvey* v. *Armstrong*, 18 Ch. D. 688), *except* that in the case of an assignment of property in favour of creditors, it is revocable until the creditors have assented to the trust, and this whether they are individually named or not. Such a provision is sometimes styled an illusory trust, as being really an arrangement for the settlor's own convenience, rather than the creation of a trust in the proper meaning of the word.

It must be borne in mind that, although, as decided in the above case, Equity will not enforce any executory trust raised by covenant or agreement unless there is a valuable consideration, yet that this does not apply to executory trusts arising under wills, for those will be carried out.

If application is made to the Court to set aside some voluntary instrument on the ground of fraud, the onus lies

on the defendant to prove that such voluntary instrument was fairly and honestly made, without any fraud or pressure on his part; and if he stood in a fiduciary capacity towards the person making such voluntary instrument, he must, in addition, shew how the intention to make it was produced in the other person. (*Hoghton* v. *Hoghton*, 15 Beav. 299.)

FOX v. MACKRETH.

(2 *Lead. Cas. Eq.* 709.)
(2 *Cox*, 320.)

In this case the defendant, Mackreth, being a trustee for the plaintiff, Fox, of certain property, agreed to buy such property of him for a sum of £39,500, and such agreement was duly carried out by conveyances being subsequently executed. Mackreth immediately afterwards sold the property to a Mr. Page for £50,500, and the plaintiff, discovering this, filed his bill to have advantage of it.

Decided:—That Mackreth having purchased the estate from his *cestui que trust* while the relation of trustee and *cestui que trust* continued to subsist between them, and without having communicated to the plaintiff the value of the estate acquired by him as trustee, he must be and was declared a constructive trustee as to the sum produced by the sale to Mr. Page.

Notes.—The true ground of the above decision was *not* the under-value, but as stated above; but it must be noted that a trustee can purchase from a *cestui que trust* who is *sui juris*, and has discharged him from all the obligations which attached to him as trustee; but even then any such transaction will be viewed by the Court with jealousy, and the trustee must shew that there is a clear and distinct contract, ascertained to be such, after the fullest examination of all the circumstances, that the *cestui que trust* intended the trustee should buy, and that there was no fraud, concealment,

or possible advantage taken by the trustee of any information acquired by him in his character of trustee.

Practically the only safe way for a trustee to buy is by leave of the Court, on application shewing the full particulars and the advantage to the *cestui que trust*. Such an application may now be made by an originating summons in Chambers under Order lv. Rule 3 (see Indermaur's Manual of Practice, 7th edit. 267); and a trustee or other person occupying a position of a fiduciary or *quasi* fiduciary nature, who, disclosing all facts which he ought to disclose, obtains the leave of the Court to purchase, is safe. (*Coaks* v. *Boswell*, L. R. 11 App. Cas. 232; 55 L. J. H. L. 761.)

KEECH v. SANDFORD.

(2 *Lead. Cas. Eq.* 693.)
(*Select Cas. in Chancery*, 61.)

Here the lease of Rumford Market had been bequeathed to B. in trust for an infant. B. before the expiration of the term applied to the lessor for a renewal of the lease for the benefit of the infant, and this was refused. B. then got a lease made to himself. On this suit being brought by the infant to have the lease assigned to him—

Decided:—That B. was a trustee of the lease for the infant, and must assign the same to him.

ROBINSON v. PETT.

(2 *Lead. Cas. Eq.* 606.)
(*P. Wms.* 132.)

Decided:—That the Court never allows an executor or trustee for his time and trouble; neither will it alter the case that the executor renounces, and yet is assisting to the executorship; and this, even though it appears that the executor or trustee has benefited the trust to the prejudice of his own affairs.

Notes on these two Cases.—The above two cases are here placed to immediately follow *Fox* v. *Mackreth*, as although that case certainly bears on a subject that they do not—viz., *purchases* by a trustee—yet they all in common are decisions on the position of a trustee, and go to shew that he can make no profit from his trust. If he does so, he becomes a con-

structive trustee of that profit for his *cestui que trust*. And this furnishes a good instance of a constructive as opposed to an implied trust properly so called (as to which see *Dyer* v. *Dyer*, *post*, p. 71), for the trust is raised here to satisfy the demands of justice without reference to any presumable intention of the parties. A fair contract between trustees, or executors, and their *cestuis que trust* who are *sui juris*, to receive some compensation for acting, is, however, good, and trustees and guardians managing the estates of West India proprietors are entitled to a commission not above £6 per cent., so long as they personally take care of the management and improvement of the estates committed to their charge; but not if they leave the place and trust the management to others acting as attorneys (2 Lead. Cas. Eq. 622). An executor appointed in the East Indies was formerly entitled to a commission of £5 per cent. upon the receipts or payments, but this is not so now, unless expressly given him by the testator (*ibid.* 623). The Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35, sect. 1) now also provides that in any proper case the Court may appoint an official trustee, who may be remunerated.

Where an executor or trustee is a solicitor, the usual course is to expressly authorise him by the trust instrument to make his proper professional charges, and if he is so authorised he is entitled to do so; but even here he is only allowed for strictly professional charges, and will not be allowed to charge for doing acts which a trustee or executor would ordinarily do personally without employing a solicitor. If by a will a solicitor is appointed executor or trustee, and the will contains a clause authorising him to make his charges for acting as solicitor, and he attests the will, he loses the right to make profit charges, as he is really a person taking a benefit under the will (*Re Pooley*, 40 Ch. D. 1; 58 L. J. Ch. 1). If a solicitor is appointed trustee without the proper provision being made for his charges, the rule is just the same as if he were a private person—viz., that he can charge nothing but reasonable expenses out of pocket. However, it has been decided that where a trustee is a solicitor he may be employed

by his *cestuis que trust*, or co-trustees, in an action relating to the trust affairs, and make the usual charges, if this does not increase the costs (*Cradock* v. *Piper*, 15 L. T. Rep. 61); and although this case has not been altogether approved of, yet it has recently been recognised as a binding authority (*Re Corsellis, Lawton* v. *Elwes*, 34 Ch. D. 675; 56 L. J. Ch. 294). Still its principle is not to be at all extended (*ibid.*), and does not apply where the trustee acts for himself and his co-trustee in the administration of the trust estate out of Court (2 Lead. Cas. Eq. 613).

As regards the investments that trustees may make of moneys in their hands, irrespective of the express provisions of the trust instrument, the subject is now governed by the Trustee Act, 1893 (56 & 57 Vict. c. 53, sect. 1), which applies to trusts created before as well as to those created since its passing. (See Indermaur's Manual of Equity, 4th edit. 73, 74.) And as regards capital money under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), certain exceptional securities are also allowed in which ordinary trustees cannot invest (*ibid.* 75).

With regard to trustees' investments on mortgage, this subject is now also governed by the Trustee Act, 1893. Under this Act (sect. 8) trustees must get the property surveyed by a surveyor they personally select (*Walker* v. *Walker*, 59 L. J. Ch. 386; 62 L. T. 449), but who need not be a local man. The report of the surveyor must state the value of the property, and advise that an advance be made, and then the trustees must not advance more than two-thirds of such value. If they advance more than two-thirds, then the excess is to be deemed a proper security for the sum they ought only to have advanced, and they are only liable to make good the sum advanced in excess thereof with interest. Generally, irrespective of the Act, the trustees must act with prudence as regards the class or nature of the property on which they advance (*Re Whitely, Whitely* v. *Learoyd*, 33 Ch. D. 347; 55 L. J. Ch. 864; *Walker* v. *Walker*, *supra*; and if they have a discretion they must exercise it with perfect honesty (*Re Smith, Smith* v. *Thompson* (1896), 1 Ch. 71; 65 L. J. Ch. 159.)

(See further hereon Indermaur's Manual of Equity, 4th edit. 74–83.)

If a trustee neglects to make the proper investments that he should have made, the claim of the *cestui que trust* against him is ordinarily for the principal money and interest at £4 per cent. per annum from the time at which it ought to have been invested. A trustee may, however, be liable for more than just stated under exceptional circumstances, which have been stated to be as follows:—

1. Where he ought to have received more, as when he had improperly called in a mortgage carrying 5 per cent.;

2. Where he has actually received more than 4 per cent.;

3. Where he must be presumed to have received more than 4 per cent., as if he has traded with the money, in which case the *cestui que trust* has it at his option to take the profits actually obtained; and

4. Where the trustee is guilty of direct breaches of trust or gross misconduct. (See Indermaur's Manual of Equity, 4th edit. 87.)

DYER v. DYER.

(2 *Lead. Cas. Eq.* 803.)
(2 *Cox*, 92.)

Here one Simon Dyer paid the purchase-money for certain property, and took the conveyance to himself, his wife Mary, and a son William, jointly. Simon Dyer survived his wife, and then died, devising all his interest in these premises to the plaintiff, who filed his bill against the son, William, insisting that as the purchase-money was all paid by Simon Dyer, the son, William, the defendant, was but a trustee.

Decided:—That though if no relationship existed there would be a resulting trust in favour of the person paying the purchase-money, yet the circumstance of the nominee being the child of the purchaser operated to rebut the resulting trust, and the defendant took the property beneficially as an advancement from his father.

Notes.—The presumption of advancement does not only arise in favour of a child, but also in favour of a wife; and in some cases it arises when a person has placed himself *in loco parentis* towards some child. And a widowed mother is a person standing in such a relation to her child as to raise the presumption in favour of her child (*Sayre* v. *Hughes*, L. R. 5 Eq. 576; 37 L. J. Ch. 401); but it has been held to be otherwise as regards the purchase by a married woman out of her separate estate in the name of a child (*Re De Visme*, 2 De G. J. & S. 17). Probably, however, a different decision would now be come to, since the Married Women's Property Act, 1882 (see 2 Lead. Cas. Eq. 821–823).

A binding contract to purchase in the joint names of a man and his wife has been held to entitle the wife to the benefit of the purchaser as survivor. Thus in *Vance* v. *Vance* (1 Beav. 605), A. B. directed his banker to invest a sum of money in the joint names of himself and his wife, and their broker accordingly made the purchase. A. B. died after the contract for purchase of the stock, but before the transfer had been completed. It was held that the wife was entitled to the stock by survivorship. But where a husband paid money into a bank to an account opened in his wife's name as a mere agency account, for the purpose of convenience, and without any contract or intention to give the wife any interest in the money, it was held to be the property of the husband, and not of the wife (*Lloyd* v. *Pughe*, L. R. 8 Ch. App. 88). Where a conveyance is taken in the name of a stranger, and therefore by equitable presumption a resulting trust arises, such resulting trust may be rebutted by parol evidence shewing that the person who paid the purchase money really intended that the person in whose name the conveyance was taken should have the property for his own benefit.

It seems that if a child has already been fully provided for by his father, this circumstance may rebut the presumption of an advancement (2 Lead. Cas. Eq. 826; and see *Hepworth* v. *Hepworth*, L. R. 11 Eq. 10). The presumption of advancement may equally apply in the case of personal estate as in the case of real—*e.g.*, where a person purchases stock and causes it to be transferred into the name of his wife or child (2 Lead. Cas. Eq. 822).

The presumption of advancement may also be rebutted by evidence of facts shewing the father's intention that the son should take property purchased in his name as a trustee and not for his own benefit. Such facts must, however, have taken place antecedently to or contemporaneously with the purchase, or else immediately after it, so as to form in fact part of the same transaction; but beyond this subsequent facts will not be admissible in evidence to shew the intention of the father against the presumption (2 Lead. Cas. Eq. 828; and see *Stock*

v. *M'Avoy*, L. R. 15 Eq. 59; 42 L. J. Ch. 230). So also the presumption of advancement may be rebutted by evidence of contemporaneous parol declarations of the father, but not by any of his declarations made subsequently to the purchase (see hereon *O'Brien* v. *Shiel*, L. R. 7 Eq. 255).

A fortiori parol evidence may be given by the son to shew the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and the equitable presumption (2 Lead. Cas. Eq. 829).

Where a son acts as solicitor for his father, the ordinary presumption in favour of a transaction in the name of the son being a gift, is excluded, and the burden of proof is thrown upon the son who acts as solicitor (*Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 352).

The true principle upon which a person in whose name property is purchased by another is held to be a trustee, is an implied intention. All such cases form good instances of an implied trust, which is indeed one founded upon an unexpressed but presumable intention. (For an instance of a constructive trust as opposed to an implied trust see *Keech* v. *Sandford*, *ante*, p. 67.)

In considering the subject-matter involved in the principal case and this note, attention should be paid, with a view to comparison and distinction, to the case of *James* v. *Smith* ((1891), 1 Ch. 384; 63 L. T. 524). There A. verbally instructed B. to attend an auction sale and buy a house for him, and B. attended and bought in his own name, and subsequently had the property conveyed to himself, paying the whole price out of his own money. A. then sued B. for a declaration that B. was his agent, and a trustee for him, and for an order for B. to convey to him (A.). The Court held that this was not a case of an implied, but of an express trust, and that, there being no writing as required by the 7th sect. of the Statute of Frauds, A. could not succeed.

ELLIOTT v. MERRYMAN.

(2 *Lead. Cas. Eq.* 896.)
(*Barnardiston's Chan. Reps.*)

Decided:—1. That where real estate is devised to trustees upon trust to sell for payment of debts generally, or charged with payment of debts, the purchaser is *not* bound to see that the money is rightly applied; but if the real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular those debts are owing, the purchaser is bound to see that the money is applied in payment of those debts.

2. But that a purchaser of leasehold or other personal estate is never liable to see to the application of the purchase-money—except in cases of fraud—because the executors are the proper persons that by law have the power to dispose of a testator's personal estate.

Notes.—The first enactment altering the position as established by the above case was 22 & 23 Vict. c. 35 (sect. 23). The statute now dealing with the subject is the Trustee Act, 1893 (56 & 57 Vict. c. 53), which replaces a former provision in the Conveyancing Act, 1881. This statute (sect. 20), which applies to trusts created both before and after the commencement of the Act, provides that "the receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof."

By reason of this enactment the above decision is, of course, of much less importance than was formerly the case.

The Trustee Act, 1893 (sect. 21), also provides that two or more trustees acting together, or a sole acting trustee where authorised to act by himself, can accept a composition, or take security for debts, or submit matters to arbitration, or release or settle the same. The like powers are given to an executor or administrator, and these provisions also apply to trusts created either before or after the passing of the Act.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65, Part I.), in the case of deaths on or after 1st January, 1898, the real estate of the deceased (other than copyholds) devolves on the personal representatives for the payment of debts in a similar way to personalty, but it is provided (sect. 2 (2)) that it shall not be lawful for some or one only of the personal representatives, without the authority of the Court, to sell or transfer the real estate.

MACKRETH v. SYMONS.

(2 *Lead. Cas. Eq.* 926.)
(15 *Ves.* 329.)

Decided:—1. That a vendor's lien for unpaid purchase-money, unless relinquished, exists against all persons except purchasers for valuable consideration without notice having the legal estate.

2. That another security taken and relied on may, according to its nature and the circumstances under which taken, be evidence of relinquishment, but the proof is on the purchaser.

Notes.—A vendor's lien may be defined as that hold or charge on property which a person has who has sold the same but has not received the purchase-money, or the whole of it. This lien exists, even though the deed expresses that the consideration is paid and a receipt is indorsed on it. It must be borne in mind that (as decided in the above case) the taking of a security is only an evidence of relinquishment by the vendor of his lien; and, as a general rule, the taking of a mere personal security—*e.g.*, a bill of exchange or promissory note—will not deprive the vendor of his lien, unless indeed there was a plain intention to substitute it for the lien, though if he take a totally distinct and independent security, such as a mortgage, the lien is usually though not invariably lost (see further hereon Indermaur's Man. of Eq., 4th edit. 54, 55).

It has been the practice not only to have a receipt in the body of a deed, but also indorsed thereon, and if it was not so indorsed thereon, this would amount to constructive notice to any purchaser of the existence of a vendor's lien so as to make him subject to it. This is, however, now no longer so, on account of sects. 54 and 55 of the Conveyancing Act, 1881

(44 & 45 Vict. c. 41), which provide that a receipt, either in the body of a deed or indorsed thereon, is sufficient in all cases. This Act also provides (sect. 56) that such receipt, duly appearing, shall be sufficient authority for the purchaser to pay over to the solicitor for the vendor. This, however, did not originally apply to the case of fiduciary vendors, but under the provision of the Trustee Act, 1893 (sect. 17), it does.

The amount of the purchase-money for which a vendor's lien exists was formerly payable, in the first instance, out of the vendee's general personal estate, but now, in consequence of 30 & 31 Vict. c. 69, sect. 2, and 40 & 41 Vict. c. 34, in any such case it is, in the absence of contrary intention, primarily payable out of the land in respect of which it exists. (See further hereon notes to *Duke of Ancaster* v. *Mayer*, *post*, p. 118.)

A vendor's lien is by some writers classified as a constructive trust, and by others as an implied trust. It is not a particularly good instance of either, for whilst it may on the one hand be fairly said to be raised simply by construction of Equity to satisfy the demands of justice, yet on the other hand it seems equally correct to say that it is founded on an implied intention.

A vendor's lien may be enforced by an action claiming a declaration that the vendor is entitled to a lien, and this declaration may subsequently be enforced by orders on motion made under the liberty to apply which is reserved in the judgment. And orders may be made for sale, or for rescission of the contract, and injunction and delivery of possession, or for payment of the purchase-money into Court, and in default delivery of possession (2 Lead. Cas. Eq. 949).

TOWNLEY v. SHERBOURNE.

(2 *Lead. Cas. Eq.* 629.)
(*Bridg. Rep.* 35.)

In this case there were several trustees, and one of them had received certain rents. The question was, whether the others were liable for his receipts.

Decided:—(1) That where lands are conveyed to two or more upon trust, and one receives the rents, his co-trustees shall not be liable unless some purchase, fraud, or evil dealing seems to have been in them to prejudice the trust, for they being by law joint-tenants, every one of them may receive either all or as much of the rents as he can come by.

(2) That it is no breach of trust to permit one of the trustees to receive the rents, it happening many times that some of the trustees live far from the lands, and it is inconvenient for them all to receive them.

(3) That if, however, a trustee, having allowed his co-trustee to receive rents, subsequently leaves in the co-trustee's hands the money that has been received, he is liable therefor.

BRICE v. STOKES.

(2 *Lead. Cas. Eq.* 633.)
(11 *Ves.* 319.)

The question in this case was, whether a trustee should be charged with certain purchase-money, which, though

he had joined in the receipt, had been received by his co-trustee.

Decided:—That *under the particular circumstances* of the case he was liable to be charged, the sale being unnecessary, and he permitting his co-trustee to keep and act with the money contrary to the trust; but that he should not be charged in respect of the interest of one of the *cestuis que trust* who had notice of the breach of trust and acquiesced therein.

Re SPEIGHT; SPEIGHT v. GAUNT.

(*L. R.* 9 *App. Cas.* 1.)
(53 *L. J. Ch.* 419.)

In this case a trustee employed a broker of good standing to purchase corporation bonds as an investment of the trust funds, the same being a proper investment. The broker sent in a contract note according to the rules of the Stock Exchange. The trustee paid the purchase-money to the broker to complete the matter, but the broker never obtained the bonds from the parties, and shortly afterwards he became insolvent.

Held:—That the trustee was not bound to make good the loss of the trust fund.

Notes.—In considering these cases attention should also be paid to sect. 24 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which provides that a trustee shall be chargeable only for moneys and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and

shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money may be deposited. *Townley* v. *Sherbourne* shews that a trustee is not necessarily liable for the breaches and defaults of his co-trustee, but that he may be, a point that is also shewn in *Brice* v. *Stokes*. That case also lays down the law as to the distinction between receipts of trustees and executors, but as it can hardly be considered altogether correct at the present day, that part of the decision has not been stated. So far as it is possible from the numerous cases on the subject to collect a clear rule, it may be stated that in the case of trustees joining in receipts, as they have but a joint authority, and their joining is therefore necessary for conformity, no presumption of receipt of the money will usually exist; but in the case of executors, as they ordinarily have not merely a joint but also a several power, if they have joined in signing the receipt a presumption of actual receipt of the money arises. But this presumption may be rebutted by shewing that in fact the particular executor did not receive the money.

Although a trustee is safe in permitting his co-trustee to receive the money, if he merely joins for conformity, yet the rule goes no further than this; for if he allows the money to remain in his co-trustee's hands for a longer time than the circumstances of the case reasonably require, he will be liable for any misapplication

It is a general rule that trustees, being but agents, cannot delegate their authority and power to others, for the maxim is, *delegatus non potest delegare;* yet they may do so where moral necessity exists, or where it is done in the ordinary and proper way of business, a point that is well shewn by the case of *Re Speight, Speight* v. *Gaunt*. But trustees in appointing any delegate, where entitled so to do, must exercise due care in the selection, so that in a recent case where they employed an outside broker they were held liable for his misapplication of the money (*Robinson* v. *Harkin*

(1896) 2 Ch. 415; 74 L. T. 777). Trustees are not liable if, in the ordinary discharge of their duty, they deposit money temporarily in a bank, and the bank fails, but it must not be more than a mere temporary deposit. Thus in one case trustees left money on deposit at a bank for a period of fourteen months, and the banker failed, and they were held liable (*Cann* v. *Cann*, 33 W. R. 40).

It will be noticed that *Brice* v. *Stokes* is also an authority to shew that acquiescence in a breach of trust discharges a trustee. The Trustee Act, 1893 (sect. 45), also provides that where a trustee shall have committed a breach of trust at the instigation, or request, or with the consent in writing of a beneficiary (see *Griffiths* v. *Hughes* (1892) 3 Ch. 105; 62 L. J. Ch. 135), the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint on anticipation, make such order as to the Court shall seem just, for impounding all or any part of the interest of the beneficiary in the trust estate, by way of indemnity to the trustee or person claiming through him. With regard to this enactment it should, however, be observed that it is the duty of a trustee to protect a married woman against herself, when she, as a married woman restrained from anticipation, asks him to commit a breach of trust; and he must not deliberately commit a breach of trust at the request, or with the consent of such a beneficiary, in the hope that the Court will afterwards assist him in removing the restraint. One of the facts to be borne in mind by the Court in the exercise of its discretion is whether the breach of trust was committed by the trustee knowingly; but it is incorrect to say that a trustee who knowingly committed a breach of trust can never have his beneficiary's interest impounded (*Bolton* v. *Curre* (1895) 1 Ch. 544; 64 L. J. Ch. 164).

LOW v. BOUVERIE.

((1891) 3 *Ch.* 82; 60 *L. J. Ch.* 594; 65 *L. T.* 533.)

The plaintiff, contemplating making an advance to Vice-Admiral Bouverie on the security of his interest in a certain estate vested in trustees, wrote to the defendant, who was one of the trustees, asking whether the Vice-Admiral's interest was subject to any incumbrances. The defendant replied mentioning certain incumbrances, but he did not say there were no others. The plaintiff then made the advance. At the date of the defendant's reply there were in fact other charges, but the defendant had forgotten them. The plaintiff's security, by reason of these other securities, proved valueless, and he brought this action to compel the defendant to indemnify him.

Decided:—That the action could not be maintained.

Notes.—In this case it was also held that a trustee was not at all bound to answer such an inquiry as the plaintiff had made. Here the defendant had chosen to answer the inquiry, but it must be observed: (1) that he thought he was giving a true answer, (2) that he did not definitely state there were no other incumbrances. Had the defendant knowingly given an untrue answer he would have been held liable on the ground of fraud. (See *Derry* v. *Peek,* 14 App. Cas. 337; 58 L. J. Ch. (H. L.) 864.) As it was he could not be held liable on this principle, but it was argued that he was liable on the principle of estoppel.

The rule of equitable estoppel is that where one, by his words or conduct, induces another to take a representation as true and to believe that he was intended to act upon it, and such other person does act upon it so as to alter his previous

position, the person making such representation is concluded from averring against such other a different state of things as existing at the same time (1 Lead. Cas. Eq. 450). On this subject *Burrowes* v. *Lock* (10 V. 470), is the case given in "White & Tudor"; but it is thought that *Low* v. *Bouverie* is a more practically useful case, and it is therefore here inserted. In *Burrowes* v. *Lock* it was held that the representation by a trustee that a trust fund is unencumbered, knowingly made to a person about to advance money to the *cestui que trust* estops the trustee from subsequently asserting the existence of a prior incumbrance to the prejudice of such person. In *Low* v. *Bouverie* the defendant did not make the representation knowing it to be false, and he did not definitely say there were no other incumbrances, but merely made a statement that there were certain incumbrances, which might be taken only to mean that these were all he remembered. Now, in order to create estoppel, a statement must be clear and unambiguous. *Low* v. *Bouverie* was decided on this principle. Had the trustee definitely said, "These are the incumbrances, and there are no others," then he would have been liable, for that would have been a clear and unambiguous statement, and would have produced estoppel.

DERING v. EARL OF WINCHILSEA.

(2 *Lead. Cas. Eq.* 535.)
(1 *Cox*, 318.)

Here two different bonds had been given to the Crown for the due performance by one Thomas Dering of a certain office, and he becoming in arrear to the Crown, one of the bonds was put in suit, and judgment recovered on it. This suit was then instituted against those who had given the other bond, claiming a contribution.

Decided:—That though the sureties were bound by different instruments, they must contribute, for the doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burden and benefit.

Notes.—This right of a surety to enforce contribution against co-sureties will not be affected by his ignorance at the time he became surety that they also were co-sureties. Courts of Common Law also compelled contribution between sureties, but there was this important distinction between contribution in Equity and at Common Law: in Equity the contribution was with reference to the time when it was sought to be enforced, but at Common Law with reference to the number of sureties originally liable. Thus: A., B., and C. being sureties, A. is forced to pay the whole amount. B. has become insolvent, nevertheless at Common Law A. could only recover a third from C., though in Equity he could recover half. Further, if a surety died, contribution could be enforced in Equity as against his representatives; but at Common Law the surviving sureties only could be sued (see *Batard* v. *Hawes*, 2 Ell. & B. 287). However, the student will remember that,

under the Judicature Act, 1873 (sect. 25), where the rules of Law and Equity formerly clashed, the rules of Equity now prevail.

With regard to the rights of sureties who are compelled to pay their principal's debt, it is provided by 19 & 20 Vict. c. 97, sec. 5, "that every person who being a surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor." Before this statute, if the debt was secured by bond or by judgment, and the surety paid the amount, he could not obtain an assignment of the bond or judgment itself, but only of collateral securities. The right to the delivery up of securities held by the creditor extends not only to a direct surety, but also to one who is so merely because of having indorsed a bill of exchange or promissory note (*Duncan Fox & Co.* v. *North & South Wales Bank*, L. R. 6 App. Cas. 1; 50 L. J. Ch. 335).

As to the different ways in which a surety may be discharged, see Indermaur's Princ. of Com. Law, 7th edit. 52. See also *Rees* v. *Berrington*, and notes in 2 Lead. Cas. Eq. 568 *et seq.*

Where one or some of several sureties only is or are sued, with a view of obtaining contribution in that action from the co-surety or co-sureties, he or they may, by means of a "third party notice," be brought in in the existing action and judgment obtained against them (Order xvi. rr. 48–51; Indermaur's Manual of Practice, 7th edit. 34–36).

COUNTESS OF STRATHMORE v. BOWES.

(1 *Lead. Cas. Eq.* 613.)
(1 *Ves. Jun.* 22.)

Lady Strathmore, during her engagement of marriage with one Mr. Grey, conveyed and assigned her property to trustees for her separate use, with his approbation. Afterwards hearing that the defendant Bowes had fought a duel on her account, she married him. Bowes had no notice of the settlement.

Decided:—That a conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *primâ facie* good, and becomes bad only upon the imputation of fraud; and that if a woman, in the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, it will be set aside because affected with that fraud; but that this case was different, the settlement indeed being with the sanction of the then intended husband, and so the settlement here was established.

Notes.—A secret conveyance by a woman pending a marriage engagement has been held to be a fraud on the husband's marital rights, although he did not know she had any property.

There appears to be one exception to the general rule laid down in *Countess of Strathmore* v. *Bowes*, and that is in the case of the previous seduction by a man of his intended wife; for it has been held that, as the husband has, by his conduct before the marriage, put it out of the wife's power to make

any stipulation for settlement of her property, retirement being almost impossible on her part, a secret settlement made by her shall not be set aside (*Taylor* v. *Pugh*, 1 Hare, 608; but see *Downes* v. *Jennings*, 32 Beav. 290).

It was also formerly supposed that another exception existed in the case of a fair settlement by a widow upon her children by a former marriage, but the authorities do not appear to warrant this, and it cannot therefore be considered as an exception, for "It is conceived that a provision for children would not render a settlement valid which without it would be fraudulent; for although in the execution of a settlement, so far as it makes provision for her children, a wife may perform a moral duty towards her children, she has no right to act fraudulently towards her husband; and she can in such circumstances only reconcile all her moral duties by making a proper settlement on her children with the knowledge of her intended husband" (see 1 Lead. Cas. Eq. 618).

It would appear that the subject-matter of this case, and notes, is materially affected by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). By section 2 it is provided that "every woman who marries after the commencement of this Act (1st Jan. 1883) shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage." As therefore she can dispose of her property directly she is married, probably she can do so pending the engagement of marriage, and that there cannot therefore now be such a thing as fraud on a husband's marital rights, for in fact he has no marital rights as regards the woman's property. This point has not, however, yet been decided, and is open to doubt (see 1 Lead. Cas. Eq. 616).

LADY ELIBANK v. MONTOLIEU.

(1 *Lead. Cas. Eq.* 621.)
(5 *Ves.* 737.)

Decided :—That a married woman may, by her next friend, maintain a suit in the Court of Chancery to assert her equity to a settlement on herself and children out of property to which she is entitled; and here the settlement on marriage being inadequate, a further settlement decreed in favour of Lady Elibank.

MURRAY v. LORD ELIBANK.

(1 *Lead. Cas. Eq.* 625.)
(10 *Ves.* 84.)

This case arose out of the foregoing one. After decree in that suit, but before any settlement in pursuance thereof, Lady Elibank died intestate, and this bill was filed by her infant children for the carrying out of the settlement in their favour, notwithstanding her death.

Decided :—That the wife obtained by the decree in the suit of *Lady Elibank* v. *Montolieu*, a judgment for the children, liable to be waived if she thought proper; otherwise to be left standing for their benefit at her death.

Notes on these two Cases.—Equity to a settlement is not any right of property in the wife, but simply a right that she has to come to the Court and ask for a settlement on herself and

her children (see hereon Indermaur's Man. of Eq. 4th edit. 392). It must be clearly understood that the equity to a settlement is strictly personal to the wife, and that the children have no independent equity of their own; so that in the case of *Murray* v. *Lord Elibank*, if Lady Elibank had died before decree, her children would not have been entitled to any settlement. If the settlement on a woman's marriage is perfectly adequate, no further settlement will be decreed; but when a settlement is decreed, the amount to be settled is usually, and in the absence of special circumstances, one-half of the property, but the circumstances may be such as to induce the Court to settle the whole (*Reid* v. *Reid*, 38 Ch. D. 220; 55 L. J. Ch. 756). If after marriage a settlement of property is made upon the wife voluntarily in consideration of her equity to a settlement, it is good as against creditors if the Court would, under the circumstances, have decreed one, had application been made to it for the purpose.

The wife's equity to a settlement forms a good example of the maxim, "He who seeks equity must do equity," for it had its origin in the fact that when the husband came to the Court to get his wife's property, the Court would, under this maxim, insist on his making a provision for his wife.

With regard to a wife waiving her right to a settlement, this she can always do (unless she is a female ward of Court married without its sanction) by her examination in open Court; and by 20 & 21 Vict. c. 57, she can by deed acknowledged under the Fines and Recoveries Act, with the concurrence of her husband, release or extinguish her right to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession, under any instrument made after the 31st of December 1857. This Act makes no provision enabling the wife to waive her right in respect of personal estate derived under an intestacy. The wife may also lose her right to a settlement by eloping and living in adultery, unless she is a ward of Court married without its sanction.

"The right of a married woman to her equity to a settle-

ment was for a long time supposed to be confined to the purely personal property of the wife of an equitable nature, but in modern times it has acquired a wider range, and is generally applied to all cases of equitable interests in real estate as well, and also to all cases of the real estate of the wife, whether legal or equitable, when the husband is obliged to come to a Court of Equity to enforce his rights against the property. As regards leasehold property, if of an equitable nature, it appears the wife is entitled to enforce her equity to a settlement thereon, but that she is not so entitled if it is a legal term of years." (Indermaur's Man. of Eq. 4th edit. 395.)

The subject-matter of this case and notes will soon cease to be of much practical importance, by reason of the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), that statute providing (sects. 2 and 5) that, with regard to any woman married before its commencement, all real and personal property her title to which accrues after the commencement thereof (1st Jan. 1883) shall be held and disposed of by her as her separate estate; and as regards any woman married since the commencement of the Act, all her property, whenever acquired, shall be to her separate use. There will therefore naturally be no occasion to come to the Court to enforce equity to a settlement when the property is already absolutely the wife's. Still, at the present time there may be many cases in which the title to property has accrued prior to 1883, and the parties were married prior to that date, so that the subject cannot yet by any means be considered obsolete. (As to accrual of title see *Reid* v. *Reid*, 31 Ch. D. 402; 55 L. J. Ch. 294.)

HULME v. TENANT.

(1 *Lead. Cas. Eq.* 654.)
(1 *Bro. C. C.* 16.)

This bill was filed by the obligee of a bond entered into by the defendants (husband and wife) against the husband and wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Decided:—That the bond of a married woman jointly with her husband shall bind her separate property.

TULLETT v. ARMSTRONG.

(1 *Bear.* 1.)

Here a testator gave certain property to trustees in trust for his wife for life, with remainder to the defendant Mrs. Armstrong (then unmarried) for life in such manner *that it should not be anticipated*, and that no husband should acquire any control over it, and the questions were as to the effect of a gift to the separate use of a woman unmarried at the time, and the effect of the clause against anticipation.

Decided:—That both the separate use clause and the restriction against alienation became effectual on the subsequent marriage, and that such a restraint against alienation is annexed to the separate estate only, and the separate estate has its existence only during coverture, but that whilst the woman is discovert the separate estate,

whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

Notes on these two cases.—Although the separate estate of a married woman may frequently be made liable for her debts, as shewn in *Hulme* v. *Tenant*, yet no personal decree could ever be made against her, and though by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1, she is made liable as a *feme sole*, and capable of being sued as such, her liability is only to the extent of her separate estate, and no personal judgment can be given against her, but it will be only as regards her separate property, with execution limited to her separate property, not subject to any restraint on anticipation, unless by reason of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 19, such property is liable to execution notwithstanding the restraint (*Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; *Galmoye* v. *Cowan*, 58 L. J. Ch. 769).

With regard to what debts of a married woman her estate was liable for, the general rule prior to the Married Women's Property Act, 1882, was that, unless restrained from anticipation, it would be liable for "all debts, &c., which she expressly charges, or which, judging from the nature thereof, it may be fairly inferred that she intended to charge on her separate estate." Thus, a promissory note, signed by her would bind it; and if she on her own accord employed a solicitor, it would be liable for his charges. However, the Married Women's Property Act, 1882 (sect. 1), materially extends this rule in enacting that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shewn."

Notwithstanding that the separate estate of a married woman may be liable for her debts, it was held, before the Married Women's Property Act, 1882, that she could not be

made a bankrupt, even though she was possessed of separate estate (*Ex parte Jones, Re Grissell*, L. R. 12 Ch. D. 484); but that statute (sect. 1) now provides that every married woman *carrying on a trade* separately from her husband shall, in respect of her separate property, be subject to the Bankruptcy Laws in the same way as if she were a *feme sole*. A bankruptcy notice cannot, however, be issued against a married woman on a judgment obtained against her for a debt contracted during coverture (*Re Lynes* (1893), 1 Q. B. 113; 62 L. J. Q. B. 372).

It was decided in the case of *Pike* v. *Fitzgibbon* (L. R. 17 Ch. D. 837; 50 L. J. Ch. 394) that a married woman's debts which bound her separate estate would, however, only bind that separate estate to which she was entitled at the date of entering into the engagement, and which still remained at the date of entering of judgment against it, and not separate estate to which she became entitled after the date of entering into the engagement; but now, under the Married Women's Property Act, 1882 (sect. 1), the contracts of a married woman bind not only her then present, but also all future accruing separate property. It was, however, held under this enactment, that to make subsequently acquired separate estate of a married woman liable for her debts, it must be proved that she was, at the time of contracting the debt, entitled to some free disposable separate estate (*Palliser* v. *Gurney*, 19 Q. B. D. 519; 56 L. J. Q. B. 546). This, however, is now altered by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63, sect. 1).

Tullett v. *Armstrong* is given above as establishing and plainly shewing the effect of the clause against anticipation, which is usually inserted in settlements giving income to a woman for her separate use. Such a clause may be attached not only where it is merely a life income which is given to a married woman, but also where a capital fund is given, and this may be so whether it is an income-bearing fund or not, if the intention of the donor appears to be that the income only shall be received by the married woman from time to time; and if this is so then she will only during marriage enjoy the

fund as an annuity though the corpus belongs to her (*Re Bown, O'Hallaran* v. *King*, 27 Ch. D. 411; 53 L. J. Ch. 881). As a general rule, however, where there is a gift of a sum of money to a married woman without power of anticipation, if there is no further indication that the income only is to be paid to her during coverture, the clause against anticipation will be rejected and the corpus paid over to her (*Re Fearon, Hotchkin* v. *Mayor*, 45 W. R. 232; see further hereon Indermaur's Manual of Equity, 4th edit. 380–382). With regard, however, to the anticipation clause, it has now been provided by the Conveyancing Act, 1881 (sect. 39), as to judgments or orders made on or after 1st January 1882, that, "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." It seems this section was primarily intended to alter the law as declared in *Robinson* v. *Wheelwright*, (6 De G. M. & G. 535), where it was held that the Court could not permit a married woman to alienate her restrained property even to the manifest advantage of her estate, but a very wide meaning has been given to the provision (*Re Flood's Trust*, 11 L. R. Ir. 355; *Re Torrance's Settlement*, 81 L. T. Newspaper, 118; Law Students' Journal, July 1886, p. 167; *Hodges* v. *Hodges*, 20 Ch. D. 749; 51 L. J. Ch. 549). But this enactment does not mean that the Court has a general power of removing the restraint on anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit (*Re Warren's Settlement*, 52 L. J. Ch. 928); and it may be stated that the tendency of the Court now is to act more strictly in the exercise of its power than has formerly been the case (*Re Pollard's Settlement* (1896), 2 Ch. 552; 65 L. J. Ch. 796).

It may be noticed that a restraint on anticipation in a settlement, does not prevent the exercise by a married woman of any power under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, sect. 61).

The Married Women's Property Act, 1893 (56 & 57 Vict. c. 63, sect. 2), now provides that in any action or proceeding instituted by or on behalf of a married woman, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation (see hereon *Hood-Barrs* v. *Heriot* (1897) A. C. 177; 66 L. J. Q. B. 356). Subject to this, under a judgment against a married woman, property which she is restrained from anticipating cannot be attached. If, however, a judgment is obtained after any income has become in arrear, that can be attached (*Hood-Barrs* v. *Heriot* (1896), A. C. 174; 65 L. J. Q. B. 352), but subsequently accruing income cannot be (*Whiteley* v. *Edwards* (1896), 2 Q. B. 48; 65 L. J. Q. B. 457); and where a creditor obtained an order for judgment under Order xiv. against a married woman before income had accrued due, but deferred signing judgment until it was in arrear, it was recently held that such income could not be attached, as the judgment related back to, and depended on the order (*Collyer* v. *Isaacs*, Law Times Newspaper, 28 August 1897).

HUGUENIN v. BASELY.

(1 *Lead. Cas. Eq.* 247.)
(14 *Ves.* 273.)

Here the plaintiff, Mrs. Huguenin, whilst a widow, constituted the defendant her agent, and he undertook the management of her property and affairs; and she afterwards executed a voluntary settlement in favour of him and his family. Mrs. Huguenin having now married, this suit was brought by her and her husband for the purpose of setting aside the settlement.

Decided:—That the settlement should be set aside as obtained by undue influence and abused confidence in the defendant as an agent undertaking the management of her affairs, upon the principles of public policy and utility, applicable to the relation of guardian and ward.

Note.—The above case forms an instance of a constructive fraud, and proceeds upon the ground of the confidential relation existing between the parties; for it is a rule, that when any such confidence exists, and the party in whom it is reposed makes use of it to obtain an advantage to himself at the expense of the party confiding, he will never be allowed to retain any such advantage, however unimpeachable such transaction would have been if no such confidence had existed. And this rule, which is founded upon general principles of public policy, applies to all relationships of a confidential nature, such as counsel or solicitor and client, promoters and directors of public companies, medical men and their patients, and ministers of religion and those confiding in them, and indeed every case in which influence is acquired and abused, or confidence is reposed and betrayed (Indermaur's Manual of Equity, 4th edit.

220). But if, though such a relationship may have originally existed as might have induced the Court to set the transaction aside, yet afterwards the party having the right to seek the Court's assistance confirms what has been done, or is guilty of laches, the Court will not interfere (*Allcard* v. *Skinner*, 36 Ch. D. 145; 56 L. J. Ch. 1052).

A solicitor because of his position must not take a gift from his client (*Tyars* v. *Alsop*, 37 W. R. 339), and this rule has recently been held to apply to a gift to the solicitor's wife. (*Liles* v. *Terry* (1895), 2 Q. B. 679; 65 L. J. Q. B. 34).

The rules of Equity in relation to gifts *inter vivos*, by which fraud is presumed when they are obtained from persons standing in certain relations to the donors, have been held not applicable to gifts by will (*Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; *Ashwell* v. *Lomi*, L. R. 2 P. & D. 477).

EARL OF CHESTERFIELD v. JANSSEN.

(1 *Lead. Cas. Eq.* 289.)
(2 *Ves.* 125.)

In this case one Mr. Spencer, at the age of 30, had borrowed £5000 of defendant on the terms of paying £10,000 if he survived his grandmother, from whom he had large expectations, and who was then of the age of 78 years, and nothing if he did not. He did survive her, and after her death gave a bond for payment of the £10,000, and paid a part. Mr. Spencer having since died, his executor brought this suit to be relieved against this contract as usurious and unconscionable.

Decided:—Not usurious, and (without deciding whether relief would have been given against the original transaction) no relief could now be given, Mr. Spencer having by his acts after his grandmother's death ratified the transaction.

EARL OF AYLESFORD v. MORRIS.

(*L. R.* 8 *Ch. App.* 484; 42 *L. J. Ch.* 546.)

Here the plaintiff, soon after he came of age, and whilst his father was living, borrowed from the defendant, who was a money-lender, sums amounting to about £7000, for which he gave bills, which, with interest and discount, together exceeded 60 per cent. These bills were renewed, and after the death of plaintiff's father, defendant sued

plaintiff on the bills, and this suit was brought for an injunction to restrain the action on payment by the plaintiff of the sums advanced, and interest at 5 per cent.

Decided:—That the plaintiff was entitled to the relief sought, and that the fact of his being an actual tenant in tail in remainder (as the case was), instead of being merely an expectant heir, made no difference.

Notes on these two Cases.—Chesterfield v. *Janssen* is a leading case on the subject of constructive fraud, which may be defined as something said, done, or omitted which is construed as a fraud by the Court, because if generally permitted it would be prejudicial to the public welfare (Indermaur's Man. of Eq., 4th edit. 210). Although in this case no relief was given, because of confirmation by Mr. Spencer of the transaction, yet the particular subject of bargains with expectant heirs was there much considered. As to these the rule in Equity is to set them aside, unless the purchaser can prove that he paid full consideration, or that the bargain, being made known to those to whose estate the expectant was hoping to succeed, was approved of by them; in which latter case there will at any rate be a strong presumption in favour of the *bona fides* of the transaction, though it must not be placed higher than this. The relief thus given to expectant heirs was formerly also given in the case of the sale of remainders and reversions, but by 31 Vict. c. 4 (sect. 1), it is enacted that "no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside *merely on the ground of undervalue;*" and by sect. 2 the word "purchase" used in sect. 1 has an extended meaning. Therefore, if there is an honest sale or mortgage of a reversionary interest, this is always good, unless there is some fraud or unfair dealing; and the practical effect is, that if the transaction is an unconscionable one, this is fraud and unfair dealing, and it is as much liable to be upset as it was before the

statute. And where the circumstances attending the dealing with a reversion raise a presumption of fraud, the onus is on the purchaser to prove that the transaction was in fact fair, just, and reasonable (*Fry* v. *Lane*, 40 Ch. D. 312; 37 W. R. 135).

The case of *Earl of Aylesford* v. *Morris* is a modern decision on the subject of bargains with expectant heirs; and whilst the former principles and rules on the subject are confirmed, they seem also to be somewhat extended, for in that case the plaintiff was not simply an expectant heir, but he was an actual tenant in tail in remainder, and yet it was held that this made no difference, and relief was given.

A more recent case on the subject is, however, that of *Nevill* v. *Snelling* (L. R. 15 Ch. D. 679; 49 L. J. Ch. 777). In that case the plaintiff was the youngest son of a Marquis, who was a large landed proprietor, but he (the plaintiff) *had no property or expectations except such as might be founded on the position of his father*. The defendant had lent him money without any thought of payment by the borrower from his own personal resources, but on the credit of his *general expectations*, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. Relief was given, the Court holding that the principle on which Equity has granted relief from an unconscionable bargain, entered into with an expectant heir or reversioner for the loan of money, applied equally to the case of such a transaction as this, though the plaintiff was not an expectant in the strict sense of the term.

Actions to set aside unconscionable bargains are treated as redemption actions, and relief is given upon payment of the sum actually advanced with interest, usually at 5 per cent. per annum, money expended by the defendant in lasting and permanent improvements on the premises being also allowed (1 Lead. Cas. Eq. 323).

SCOTT v. TYLER.

(1 *Lead. Cas. Eq.* 535.)
(2 *Bro. Ch.* 431.)

Here a legacy had been given to a daughter, one moiety of which was to be paid to her at 21 if then unmarried, and the other moiety at 25 if then unmarried; but in case she married before 21 with the consent of her mother, to be settled upon her as mentioned in the will. The daughter married under 21 without the consent of her mother.

Decided:—That the legacy did not vest in the daughter upon the marriage, and that she never came under the description to which the gift of the legacy was attached.

Notes.—Conditions and contracts operating unduly in restraint of marriage are generally void, on principles of public policy, as constructive frauds. Not only are conditions which are in general restraint of marriage void, but so also are conditions which are calculated to lead to a prohibition of marriage—*e.g.*, not to marry a man of a particular profession or calling. But conditions in reasonable limited restraint of marriage are good—*e.g.*, not to marry a particular person, or not to marry before 21 or some other reasonable age (1 Lead. Cas. Eq. 554, 555).

If land is devised, or money given to be raised out of land, on condition of marrying with a certain person's consent, the gift will not take effect unless the condition is complied with, even though there is no gift over; and the position appears to be the same with regard to a gift of purely personal estate (1 Lead. Cas. Eq. 556–558).

If a legacy is given subject to a condition subsequent in

general restraint of marriage, the condition is void, and the legatee retains the interest given to him discharged from the condition, even though there is a limitation over. But if the condition subsequent is in limited restraint of marriage, and there is a gift over, the condition is good. If there is no condition over it is deemed to be *in terrorem* and bad. In the case, however, of a devise of land a condition subsequent in limited restraint of marriage is good, even though there is no gift over, and possibly a condition here in general restraint of marriage is also good. The reason for the distinction is that as to devises and legacies charged on land, the rules of the Common Law are followed, whilst with regard to personal legacies the rules observed are those of Equity, adopted from the Civil Law (1 Lead. Cas. Eq. 558–561).

A limitation to a person until marriage must be distinguished from a condition, for where property is limited to a person until marriage, and upon marriage then over, this is good (*Heath* v. *Lewis*, 3 De G. M. & G. 954).

Where a gift is made upon condition of marriage with the consent of a certain person, that person is entitled to exercise a fair and honest discretion in granting or withholding such consent, and is not obliged to shew the reason for his refusal to consent. But where the refusal proceeds from any vicious, corrupt, or unreasonable cause, the Court will interfere, and if the person whose consent is necessary refuses either to consent or dissent, the Court will direct a reference to inquire and state to the Court whether the marriage is a proper one (1 Lead. Cas. Eq. 566, 567).

Upon principles of public policy similar to those which forbid contracts and conditions in general restraint of marriage, it has been held that where a bequest is made to a married woman upon condition of her living separate from her husband, the condition is void, and the legatee takes the legacy freed from the condition.

HOWARD v. HARRIS.

(2 *Lead. Cas. Eq.* 11)
(1 *Vern.* 190.)

Decided:—That no agreement in a mortgage can make it irredeemable, either after the death of the mortgagor or upon failure of issue male of his body.

MARSH v. LEE.

(2 *Lead. Cas. Eq.* 107.)
(2 *Ventris*, 337.)

Decided:—That if a third mortgagee, having advanced his money *without notice of a second mortgage*, afterwards buy in a first mortgage or statute, yet he (the third mortgagee) having obtained the first mortgage or statute, and having the law on his side and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.

BRACE v. DUCHESS OF MARLBOROUGH.

(2 *P. Wms.* 491.)

Decided:—That if a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall *not* tack this to his judgment, &c., and thereby gain a preference, *for he did not advance his money on the immediate credit of the land;* but if a first mortgagee

lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage and statute or judgment be paid.

Notes on these three Cases.—The firstly above-mentioned case is merely given as illustrative of the rule or maxim, "Once a mortgage always a mortgage," which means that when a transaction is clearly meant to be a mortgage, then a mortgage it must remain, any provision to the contrary notwithstanding. (See also *Salt* v. *Marquis of Northampton* (1892), A. C. 1; 61 L. J. Ch. 49.)

In the third of the above cases the doctrine of tacking was much considered, and a number of rules on the subject were stated, but the points above set out are the most important to remember in connection with the decision in *Marsh* v. *Lee*. It is very important to know accurately when tacking will be allowed, and when not, and the student will be more likely to remember the distinction if he bears in mind that tacking is *not* allowed when the money was not originally advanced on the immediate credit of the land.

The doctrine of tacking forms a good illustration of the maxim, "Where the equities are equal the law shall prevail;" for the third mortgagee, being without notice of the intervening incumbrance, has as good a title in conscience as such incumbrancer, and by getting hold of the first mortgage, &c., he has the law on his side.

Tacking was abolished by the Vendor and Purchaser Act 1874 (37 & 38 Vict. c. 78, sect. 7), which provision came into operation on the 7th August, 1874; but this provision was repealed by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87, sect. 129), except as to anything done thereunder before the commencement of the Act (1st January, 1876), so that in transactions between 7th August, 1874, and 31st December, 1875, both inclusive, tacking was non-existent.

The student should be careful not to confuse tacking with the doctrine of consolidation of mortgages, which is this, that

when the same mortgagor has mortgaged different estates to the same mortgagee, or to different mortgagees, and they become ultimately vested in one mortgagee, he cannot redeem one of such mortgages without redeeming them all. The case of *Vint* v. *Padget*, which is next given, relates to this doctrine.

Where a mortgagee realises after the death of a mortgagor, and has a surplus in his hands, he is not entitled to retain that surplus towards satisfaction of another debt which the deceased owed to him (*Talbot* v. *Frere*, 9 Ch. D. 568; *Re Gregson, Christison* v. *Bolam*, 36 Ch. D. 223; 57 L. T. 250).

VINT v. PADGET.

(2 *De G. & J.* 611.)

Two estates were mortgaged to distinct mortgagees. The mortgagor then made a second mortgage of the two estates to another person. Afterwards the two first mortgages were transferred to one person, with notice of the second mortgage. The transferee then brought a foreclosure suit against the second mortgagee, requiring him to pay off both mortgages.

Decided:—That the transferee was entitled to unite the two mortgages, and that the second mortgagee was not entitled to redeem one without the other.

Notes.—This is the doctrine of consolidation, the distinction between which and tacking is manifest. In this case Lord Justice Turner bases his decision on the ground that the second incumbrancer must be deemed to have taken his security with knowledge that the mortgages on the two estates, though then belonging to different mortgagees, might coalesce and be united against him.

The decision in the above case has been doubted, but has recently been approved and followed by the House of Lords in *Pledge* v. *White* ((1896), A. C. 187; 65 L. J. Ch. 449). The doctrine, however, in its entirety has been much modified, and the following cases which are mentioned are not affected by *Pledge* v. *White*. In the case of *Baker* v. *Gray* (1 Ch. D. 491), Gray mortgaged property situated in Gray's Inn Lane to three mortgagees successively, each with notice of the other. Gray then mortgaged the same and other property to Baker. Afterwards Baker bought up the first mortgage, and then filed a bill for a declaration that he was entitled to consolidate the first

mortgage he had bought up, and his fourth mortgage, as against the two intermediate mortgagees, but it was decided that he had no such right of consolidation.

The limit to be placed on the right of consolidation is very clearly put by Vice-Chancellor Hall, in *Baker* v. *Gray* (1 Ch. D. 494). He says: "It has been stated that the doctrine depends upon an equity arising out of the right of the mortgagee to say to the person who comes to redeem, 'If you want to redeem you must do equity.' That doctrine is simple enough when the person who wishes to redeem is the mortgagor himself. To him the mortgagee may say, 'You seek to pay me off one mortgage, but I have another debt against you, secured upon another estate, and instead of compelling me to resort to my remedies in respect of such other debt, pay off both mortgages, otherwise you shall not redeem one.' That is intelligible, but when the rights of other persons intervene, it must be seen whether it is or not reasonable to apply this as against them. . . . . There, has, however, been no case decided on that principle, applied to the case of a mortgage non-existing at the time when the second mortgage was created."

In the case of *Jennings* v. *Jordan* (L. R. 6 App. Cas. 698; 51 L. J. Ch. 129), the facts were that a mortgagor conveyed the equity of redemption of two cottages to trustees, on the marriage of his daughter, to hold on the trusts of the settlement. The trustees commenced an action against the mortgagee for the redemption of the property. The defendant (who denied all notice of the conveyance to the trustees) sought to consolidate with the mortgage on the cottages a mortgage on other property of the mortgagor which had been made subsequently to the conveyance to the trustees. It was decided that the trustees were entitled to redeem the cottages without paying off the charges on the other property. Lord Justice Cotton, in delivering the judgment of the Court, further elucidates the rule that mortgages which were not existing at the time when a third person acquired an interest in the equity of redemption cannot be consolidated. "The principle which allows, as against a subsequent purchaser or mortgagee,

the right of consolidation, is, that the mortgagor cannot by any dealing with the equity of redemption prejudice the rights of his mortgagee. This can only apply to rights already given, or arising from acts already done by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption, by any act done subsequently to the sale or mortgage of his estate. . . . . In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. . . . . But in our opinion he is not subject to any equity arising from acts done by his vendor subsequently to the sale, and therefore as against a purchaser of an equity of redemption of an estate there can be no consolidation of a mortgage subsequently created on another estate."

The principle of limitation of the doctrine of consolidation was still further acted upon in the case of *Harter* v. *Colman* (19 Ch. D. 630; 51 L. J. Ch. 481). This case decides that when two mortgages, made by the same mortgagor to different mortgagees on different estates, become united for the first time in one person after the mortgagor has assigned, by way either of sale or mortgage, the equity of redemption of one of them, the owner of the two mortgages cannot consolidate them them as against the assignee of the equity of redemption, even though both the mortgages were created before the assignment. The assignee of an equity of redemption takes it subject to all equities which affect the assignor in respect of it at the date of the assignment only; but the possibility that the mortgage may—by virtue of its subsequent union in the same person with a mortgage of another estate made previously to the assignment by the same mortgagor to a different mortgagee—become liable to consolidation, is not such an equity.

Another case that should be noticed in considering this doctrine is that of *Cummins* v. *Fletcher* (14 Ch. D. 69; 49 L. J. Ch. App. 563). In that case there were two different mortgages by the same mortgagor to a building society; the property comprised in one of the mortgages, or part of it, was

conveyed by the mortagor to the National Provincial Bank, subject to the one mortgage on it, and the bank duly kept up all payments, but on the other mortgage there was default. The building society sought to consolidate the two properties thus mortgaged to them. The Court held, however, that they were not entitled to do so, for that consolidation only applies where default has been made on all the securities in respect of which it is claimed.

It will be seen from the foregoing observations how much the doctrine of consolidation has been modified; and in addition it has now been provided by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, sect. 17), with regard to cases in which the mortgages, or one of them, are or is made on or after 1st January, 1882, and so far as no contrary intention is expressed, that a mortgagor seeking to redeem shall be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (See further as to Consolidation of Mortgages, 2 Lead. Cas. Eq. 143–149.)

RUSSEL v. RUSSEL.

(2 *Lead. Cas. Eq.* 76.)
(1 *Bro. C. C.* 269.)

Here a lease had been pledged with the plaintiff by a person since bankrupt, and the plaintiff now brought his bill against the assignees for the sale of the leasehold estate.

Decided:—That the deposit created a good equitable mortgage.

Notes.—An equitable mortgage by deposit of title-deeds is now of common occurrence, but the above case is cited to shew that such a transaction is good, notwithstanding the 4th section of the Statute of Frauds (29 Car. 2, c. 3)—a point which was previously, and with reason, much doubted.

The principle indeed upon which equitable mortgages exist seems to be that they were allowed necessarily from the nature of the case, for a Court of Law could not assist a person who had pledged his deeds to recover them back, as the answer to such an action would have been that they were pledged, and that the party who pledged them had no right to them until he paid the money; and again, if the person came into Equity to recover the deeds, he would have been told, under the maxim, "He who seeks equity must do equity," that he must repay the money before he could have the deeds. (See *per* Lord Abinger in *Keys* v. *Williams*, 3 Y. & C. Exch. Cas. 55, 61.)

The proper remedy of an equitable mortgagee by deposit simply, is foreclosure (*James* v. *James*, L. R. 16 Eq. 153; 42 L. J. Ch. 386); but if there is a memorandum containing an agreement to execute a legal mortgage, the mortgagee has a right to a sale (*York Union Bank* v. *Artley*, L. R. 11 Ch. D. 205.) And it may be observed that in any foreclosure or re-

demption suit the Court has, under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, sect. 25), full power to direct a sale on such terms as it thinks fit, including, if it thinks proper, the deposit in Court of a reasonable sum to meet the expenses of the sale, and to secure the performance of the terms (see *Oldham* v. *Stringer*, 33 W. R. 251). And if an equitable mortgage is by deed, made since the Conveyancing Act, 1881, the equitable mortgagee may exercise the power of sale conferred by that Act, but he can only convey the estate vested in him—that is, the equitable estate, and not the legal estate (*Re Hodson & Howe*, 35 Ch. D. 668; 57 L. J. Ch. 755).

Foreclosure, redemption, &c., may now be obtained, if desired, by means of an originating summons in Chambers, under Ord. lv. r. 5*a*. (See Indermaur's Manual of Practice, 7th edit. 271.)

LE NEVE v. LE NEVE.

(2 *Lead. Cas. Eq.* 175.)
(*Amb.* 436.)

Here lands in Middlesex were settled by a deed which was *not* registered. Many years afterwards they were settled on a second marriage, and the settlement was duly registered; but the agent of the person taking the lands under the second settlement had notice of the former.

Decided:—That the object of the Register Act being only to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent conveyances, the former settlement should be preferred because of the notice, and that notice to an agent or trustee is notice to the principal.

AGRA BANK (Limited) v. BARRY.

(*L. R.* 7 *Eng. & Ir. Apps.* 135.)

In this case, one Mr. Barry having borrowed money to a large amount of his wife, who was executrix of her former husband, and being pressed by her to execute some security for the same, consented to give a legal mortgage on certain property of his in Ireland. A solicitor in England was employed to prepare the mortgage, and he asked Mr. Barry for the title-deeds, and Mr. Barry replied that they were at his residence at Lota, in Cork, and thereupon the mortgage was executed without their

production. It afterwards turned out that the deeds had been deposited by Mr. Barry with the Agra Bank by way of equitable mortgage, and the question in this case was which security should have priority.

Decided:—That the legal mortgage had priority, as, though the absence of the deeds would primarily amount to constructive notice, yet that constructive notice was rebutted by the solicitor having inquired for the deeds, and a reasonable excuse having been given for their non-production.

Notes on these two Cases.—An interest in property is often rendered subservient to a prior interest by reason of notice, where, if there had been no such notice, the latter would have had the preference. Notice may be either actual or constructive, which last is, in fact, only evidence of notice, the presumption of which is so violent that the Court will not allow of its being controverted; and whatever is sufficient to put a person upon inquiry is constructive notice of everything to which that inquiry might have led; thus absence of title-deeds may constitute constructive notice of some prior interest, but if their absence is satisfactorily accounted for it will not, as is shewn in the case given above of *Agra Bank* v. *Barry*.

It would seem that if a person designedly abstains from inquiry for the purpose of avoiding notice, he will be affected with constructive notice notwithstanding.

It should be mentioned that the mere fact of the registration of a deed affecting lands in a register county is not of itself notice. It has also been decided that a further charge is a conveyance requiring registration, and will be void as against a subsequent registered mortgage, not merely postponed to it, so that it cannot be tacked to the first mortgage (*Credland* v. *Potter*, L. R. 10 Ch. App. 8; 44 L. J. Ch. 169).

Notwithstanding that registration is not of itself notice,

when a general search is admitted or proved, it is a rule of evidence, or presumption, that the party searching was acquainted with all the contents of the register; but the purchaser may exclude that presumption by shewing that he has confined himself to a more limited search.

It does not necessarily follow that notice to the solicitor of a party is equivalent to notice to him, as there is no such thing as a permanent office of solicitor; and therefore in giving notice it is always desirable to give it direct, or in giving it to a solicitor to require him to get an acknowledgment from his client, whom it is desired to charge with notice (*Saffron Walden Building Society* v. *Rayner*, 14 Ch. D. 406; 49 L. J. Ch. 465).

The Conveyancing Act, 1882 (45 & 46 Vict. c. 39, sect. 3), declares the law as to constructive notice to be as follows:— "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (1) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (2) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspection had been made as ought reasonably to have been made by the solicitor or other agent."

With regard to registration under the Middlesex and Yorkshire Registry Acts (East and North Riding), a will to be valid against subsequent purchasers must be registered within six months after the death of the devisor when he dies in Great Britain, or within three years after the death of the devisor when he dies on the seas or beyond the seas (7 Anne, c. 20, sect. 8; 6 Anne, c. 35, sects. 1, 14; 8 Geo. 2, c. 6, sects. 1, 15). Under the West Riding Act the will must be registered within six months if the devisor dies in England, Wales, or Berwick-on-Tweed, and within three years if he dies elsewhere (2 & 3 Anne, c. 4, sect. 20). It is not necessary to register a will if the devisee is also heir-at-law, and on the subject of the necessity

of registration of a will the provision of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), must now be borne in mind, that Act enacting (sect. 8) that where the will of a testator devising lands in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such lands to a purchaser or mortgagee by the devisee, or by some person deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

As regards land in Yorkshire, the principle of the case of *Le Neve* v. *Le Neve* has no longer any effect, by reason of the provisions of the Yorkshire Registries Acts, 1884 and 1885 (47 & 48 Vict. c. 54, sect. 14, and 48 & 49 Vict. c. 26, sect. 4), which give to assurances and wills priority according to the date of registration, which will not be lost by reason of actual or constructive notice, except in cases of actual fraud (see 1 Prideaux, 16th edit. 135).

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65, Part III.), has now made certain conditional provisions for the compulsory registration of the title to land in certain cases. Its operation, however, depends upon Orders in Council to be made, and the first order is not to affect more than one county. The Act appears to be a tentative provision, and at present is not in force. It will be necessary however for students to consider Part III. of this Act, and notice what provisions are made by Orders in Council.

BASSETT v. NOSWORTHY.

(*2 Lead. Cas. Eq.* 150.)
(*Rep. temp. Finch*, 102.)

The bill was filed by an heir-at-law against a person claiming as purchaser from a devisee under the will of his ancestor, to discover a revocation of the will, and the defendant pleaded that he was a purchaser for valuable consideration *bonâ fide*, without notice of any revocation.

Decided:—That this plea was good, and upon proof of it the bill was dismissed.

Notes.—This case proceeded upon the supposition that the plaintiff had a full legal title, and that he might have proceeded at law in an action of ejectment, endeavouring there to make out his case upon his own evidence. The case illustrates the force which Equity allows to the defence of "*bonâ fide* purchaser for valuable consideration without notice," so that even though the plaintiff had the legal estate, Equity, while exercising its auxiliary jurisdiction (*i.e.*, pure Equity as distinguished from concurrent law), refused to help the plaintiff. This principle is further illustrated by the cases of *Wallwyn* v. *Lee* (9 Ves. 24) and *Heath* v. *Crealock* (L. R. 10 Ch. D. 22).

The principle above enunciated should be carefully considered together with the principle embodied in the maxim, "Where the equities are equal, the law shall prevail," as to which see *Marsh* v. *Lee* and notes, *ante*, pp. 103–105.

But it must in connection with the above case be noticed that now Law and Equity are fused, and discovery is not peculiar to one Division of the Court more than to another, the principle of the decision is not fully applicable. This is shewn by the case of *Ind* v. *Emmerson* (12 App. Cas. 300; 56 L. J. Ch. 989). That was an action of ejectment brought

by a devisee under a will against the defendant, who was a purchaser from the testator's heir-at-law. The testator was a fee-simple owner, and was supposed to have died intestate; and the defendant bought of his heir, and was in possession under that title. The plaintiff now alleged that a will had subsequently to the sale been discovered under which he took the lands. The defendant pleaded (1) that he was in possession, and (2) that he was a *bonâ fide* purchaser for value, and on this latter ground he resisted the giving of discovery. The House of Lords held that the defendant could not successfully resist discovery, for the action was not like a bill of discovery in aid of an action at Common Law, but was really an action of ejectment, and that, the discovery being only sought as an incident in the action, the plaintiff was entitled to it.

DUKE OF ANCASTER v. MAYER.

(1 *Lead. Cas. Eq.* 1.)
(1 *Bro. C. C.* 454.)

Decided:—That the general personal estate is primarily liable to the payment of the debts of the testator, unless exempted by express words or by necessary implication.

Notes.—It may be useful to give here a short statement of, firstly, the order in which assets are applied in payment of debts; and, secondly, when the general personal estate is not the primary fund for that purpose.

Firstly. The order is as follows:—

(1) The general personal estate as shewn by the above case.

(2) Any estate devised only for the particular purpose of paying debts.

(3) Estates descended to the heir.

(4) Real or personal property devised or specifically bequeathed to particular devisees or legatees, or suffered to descend, but charged with payment of debts.

(5) General pecuniary legacies *pro ratâ*, including herein annuities, and also demonstrative legacies which have become general (*Re Stokes*, *Parsons* v. *Miller*, 67 L. T. 223; *Re Salt*, *Brothwood* v. *Keeling* (1895), 2 Ch. 203; 64 L. J. Ch. 494).*

* In 1 Lead. Cas. Eq. 32 the order of the above two assets respectively numbered 4 and 5 is reversed, but it is submitted that that is not correct, and that the order should be as stated above, as the case of *Re Bate* (43 Ch. D. 600), which is quoted as the authority, has not been followed, as, indeed, is stated; and, this being so, there seems no good reason for altering what has certainly before *Re Bate* always been considered the proper order.

(6) Specific legacies (including demonstrative legacies which remain demonstrative) and real estate devised specifically or by way of residue, and not being at the time charged with debts. (See *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; 37 L. J. Ch. 97; *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136; 44 L. J. Ch. 203.)

(7) Real and personal estate appointed by will under a general power of appointment.

(8) Paraphernalia of the widow of the deceased.

(9) Property comprised in a *donatio mortis causâ*.

Secondly. The personal estate is *not* the primary fund for payment of debts in the following cases:—

(1) Where it is exempted by express words.

(2) Where it is exempted by testator's manifest intention; and on this point the fact that the testator has charged his real estate is not alone sufficient, but he must also have shewn that it was his purpose that the personal estate should not be applied.

(3) Where the debt forming the charge or incumbrance is in its own nature real—*e.g.*, a jointure.

(4) Where the debt was not contracted by the person whose estate is being administered, but by some one else, from whom he or his vendor took it, as in the case of a mortgage created by an ancestor.

(5) In cases coming within the provisions of 17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, or 40 & 41 Vict. c. 34.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65, Part I.), in the case of death on or after January 1, 1898, the real estate of a deceased person, other than copyholds, is to vest in his personal representatives, and is to be administered by them in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents as if it were personal estate; but it is expressly provided that this

is not to alter or affect the order in which real and personal assets respectively are applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with payment of legacies.

As to the order in which debts are paid on a person's decease see Indermaur's Manual of Equity, 4th edit. 122, 123, and particularly observe the effect of section 10 of the Judicature Act, 1875 (as an instance of which see *Re Leng*, *Tarn* v. *Emmerson* (1895), 1 Ch. 652; 64 L. J. Ch. 468), and the provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, sect. 125), as amended by the Bankruptcy Act of 1890 (53 & 54 Vict. c. 71, sect. 21). (*Ibid.* 123–127.)

BRODIE v. BARRY.

(*2 V. & B.* 127.)

Here property was bequeathed to a person who was testator's heiress to heritable property in Scotland, a disposition of which was made to another person by the will, but in a manner not conformable to the law of Scotland, so that it did not pass under the will. The question was whether the heiress should be allowed both to take the benefits given to her by the will, and also, as heiress, the property thus informally dealt with, or whether she should be put to her election.

Decided:—That the Scotch heiress could *not* take both the benefits given her by the will, and the property, which, being informally dealt with, would descend to her; but that she must elect between them.

COOPER v. COOPER.

(*L. R.* 7 *Eng. & Ir. Apps.* 53; 44 *L. J. Ch.* 6.)

The proceeds of an estate being given in trust as one Mrs. Cooper should appoint, she appointed the same to her three sons, her executors, &c., equally, subject to a power of revocation by deed. She never exercised this power of revocation; but by her will and codicils, treating herself still as having a disposing power over the said property, she gave it absolutely to the eldest of the three sons, and gave other benefits to the children of the second

son (he having in the meantime died leaving children), and also to the third son. This suit was brought to compel the third son, and the children of the second son, to elect between taking under the settlement or under the will and codicils. There was no contention as to the third son, who admitted that he must elect; but the children of the deceased son objected to elect, on the ground that, they taking their parent's interest under the Statute of Distributions as next of kin, their rights were of an undefined and intangible nature, and not the subject of election.

Decided:—That the Statute of Distributions is nothing but a will made by the Legislature for an intestate, and that (subject to the claims of creditors) the title of the next of kin is substantial and complete, and that the rights of these children of the second son were exactly the same as were the rights of the third son, and that they must elect.

Notes on these two Cases.—The doctrine of election may be defined as the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both (Indermaur's Manual of Equity, 4th edit. 298). The above case of *Brodie* v. *Barry* is given here in preference to those of *Noys* v. *Mordaunt* and *Streatfield* v. *Streatfield*, set out in Messrs. White and Tudor's work (vol. 1, pp. 414, 416), as it forms a very simple and striking example of the doctrine, and it has been since followed in the case of *Orrell* v. *Orrell* (L. R. 6 Ch. App. 302; 40 L. J. Ch. 539). The second case above given—viz., that of *Cooper* v. *Cooper*—is a modern case before the House of Lords,

in which the doctrine of election was much discussed; and it is important as carrying the doctrine of election a step further, and deciding that persons taking interests under the Statute of Distributions are subject to the doctrine of election in the same way as those through whom they claim would have been. It also points out, as incidental to this decision, what really the Statute of Distributions is, and what is the nature of the interest of the next of kin under it.

It is important to remember that when a person elects against an instrument—that is, refuses to give up his own property—he does not always absolutely forfeit the benefits given him by it, but only so much thereof as will compensate the disappointed party. Thus, if a testator gives to A. £1000, and to B. a house of small value to which A. is entitled, and A. refuses to conform to the testator's will, he is only bound to give up so much of the £1000 as the house is worth, so as to compensate B. (See *Streatfield* v. *Streatfield*, 1 Wh. & Tu. 416.)

An election need not necessarily be made in express words—it may be implied; but what will amount to an implied election is a question to be determined principally upon the circumstances of each particular case. And any acts to be binding on a person must be done with a knowledge of his rights, and also with the knowledge of the existence of the doctrine of election, and of his right to elect (Indermaur's Manual of Equity, 4th edit. 305).

Where an infant has to elect, in some cases the period of election is deferred until after he comes of age. In other cases there has been a reference to chambers to inquire what would be most beneficial to the infant, and in others an order has been made in which the Court has elected for the infant without a reference to chambers (*Re Montagu*, *Faber* v. *Montagu* (1896), 1 Ch. 549; 65 L. J. Ch. 372). The practice as to election by married women also varies, it having been sometimes held that there should be an inquiry what is most beneficial for them, and this must be taken to be the ordinary course of procedure. However, in some cases it has been held

that married women can elect, and even as to real property, without a deed acknowledged, upon the principle that to hold otherwise might be to permit her to commit a fraud. (*Wilder* v. *Piggott*, 22 Ch. D. 263; 52 L. J. Ch. 141.) And of course this would *a fortiori* be so now, since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75); but probably this statute has not altered the general practice of the Court with regard to acting in the case of a married woman who has not already elected, by directing an inquiry as just mentioned. It should also be observed that in consequence of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, sect. 39), a married woman can, with the sanction of the Court, elect, even though the property to be given up may be settled on her without power of anticipation.

With regard to lunatics, the practice is to direct an inquiry to be made in Chambers as to which is most beneficial for the lunatic, and the Court will then elect for the lunatic in accordance with the result of such inquiry (Indermaur's Manual of Equity, 4th edit. 309).

FLETCHER v. ASHBURNER.

(1 *Lead. Cas. Eq.* 327.)
(1 *Bro. C. C.* 497.)

Decided:—That it is an established principle that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever way the direction is given; and therefore, in this case, that real estate having been ordered to be sold, it became personalty, and went accordingly.

ACKROYD v. SMITHSON.

(1 *Lead. Cas. Eq.* 372.)
(1 *Bro. C. C.* 503.)

Here the testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees. Two of these residuary legatees died in the testator's lifetime; and this bill was filed by the next of kin of the testator claiming these lapsed shares, and the question was, whether such shares—being originally composed partly of real and partly of personal state—belonged to the next of kin as being converted into personalty, or whether the part originally composed of real estate resulted as real estate,

and therefore descended to the heir-at-law of the testator.

Decided:—That so far as the shares were originally constituted of personal estate they should go to the next of kin; but so far as they originally consisted of real estate they should go to the heir-at-law.

Notes on these two Cases.—"Equity looks on that as done which ought to be done." It is upon this maxim that the case of *Fletcher* v. *Ashburner* proceeds, and that case, or more generally the whole doctrine of conversion, forms indeed the best illustration of this maxim. Conversion has been well defined as "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such." To effect a conversion it is necessary that the direction to convert should be imperative and not optional, and a direction to convert at the request of certain parties will be held imperative, unless this provision is inserted for the purpose of giving a discretion to those parties. Conversion, when directed by a deed, usually takes place from the date of the deed (*Griffiths* v. *Ricketts*, 7 Hare, 311), but when directed by a will, from the date of the death of the testator (*Beauclerk* v. *Mead*, 2 Atk. 167). Where a conversion depends on the exercise of a future option to purchase, the conversion takes place from the date of the exercise of such option, and until then the rents and profits go to the persons who were entitled to the property up to that time. Where a testator, after specifically devising property, agrees to sell it, or gives a person an option of purchasing it which such person exercises, this operates to substantially revoke the prior devise; but where he has already agreed to sell it, or rendered it subject to an option of purchase, and then specifically devises it, the purchase-money takes the place of the estate, and goes in the same way as the estate would have gone. (See more fully Indermaur's Man. of Equity, 4th edit. 336–340.)

The case of *Ackroyd* v. *Smithson* is sometimes confused by students with that of *Fletcher* v. *Ashburner* as simply deciding the doctrine of conversion, and they are, chiefly for that reason, considered here together. *Ackroyd* v. *Smithson* is of course quite beyond the doctrine of conversion, and forms an instance of a resulting trust, shewing that where conversion is simply directed for a particular purpose, and the purposes of the conversion fail, there the property shall remain and go in its original state; thus, if a testator devises property to trustees to sell and divide the proceeds between two persons, and they die during the testator's lifetime, the property remains in its original state, and if only one of the parties dies, as to his moiety there will be no conversion, but it will go according to its original quality; and the principle of this is, that where an estate is converted merely *for a particular purpose*, and that fails, the Court will not infer an intention to convert for any other purpose. The reason of the decision is no doubt found mainly in the intention of the testator. Certainly it was the testator's design to convert his real estate into personalty out and out for the purposes of the will—that is, for the benefit of the residuary legatees—and there was a complete conversion as regarded them; but when certain of the persons could not take, and the property must go, therefore, to some one else, it was impossible to infer a similar intention to convert in favour of the next of kin, whom the testator never had in contemplation. *Ackroyd* v. *Smithson* is only on the point of a resulting trust in the case of *real* estate directed to be sold, and it was at first doubted whether the rule there established applied to the case of *money* directed to be laid out in the purchase of land to be settled upon trusts which either wholly or partially failed; but it has now long been decided that it does so apply (*Cogan* v. *Stevens*, 1 Beav. 182). As regards the question as to the quality in which property results on failure of the objects for which conversion is directed, the student is referred to Indermaur's Man. of Eq., 4th edit. 346–348.

Following on the doctrine of Conversion comes that of Reconversion, which has been defined as "that notional or

imaginary process, by which a prior constructive conversion is annulled and taken away" (Snell's Principles of Equity, 11th edit. 205); thus land is given upon trust to sell and pay the proceeds absolutely to A., and conversion here takes place; but A. can say he prefers the land and will take the land—that is reconversion. If there are several persons interested in the subject-matter the further question arises, Can one reconvert without the consent of the other or others?—that is to say, firstly, land is directed to be sold and the proceeds paid to A. and B.; and, secondly, money is directed to be laid out in the purchase of land for A and B.: in these cases can A. elect to take his share in its original quality; that is, can he reconvert without B.? The answer is, that in the first place he cannot (*Holloway* v. *Radcliffe*, 23 Beav. 163), but in the second he can (*Seeley* v. *Jago*, 1 P. Wms. 389). As regards reconversion by operation of law, see *Chichester* v. *Bickerstaff*, (2 Vern. 295); Indermaur's Man. of Eq., 4th edit. 353.

HOWE v. EARL OF DARTMOUTH.

(1 *Lead. Cas. Eq.* 68.)
(7 *Ves.* 137.)

Decided :—That it is a general rule that where personal property is bequeathed for life with remainders over, *and not specifically*, it is to be converted into the Three per Cents., subject in the case of a real security to an inquiry whether it will be for the benefit of all parties, and the tenant for life is entitled only upon this principle : thus wasting property is converted for the benefit of persons in remainder, future interests for the benefit of the tenant for life.

Notes.—The rule laid down in the case of *Howe* v. *Earl of Dartmouth* has been stated as follows :—"Where personal estate is given in terms amounting to a general residuary bequest to be enjoyed by persons in succession, the interpretation the Court puts upon the bequest is that the persons indicated are to enjoy the same thing in succession, and in order to effectuate that intention the Court, as a general rule, converts into permanent investments so much of the personalty as is not so invested, and also reversionary interests. The rule did not originally ascribe to testators the intention to effect such conversions except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property as the only means of giving effect to that intention" (1 Lead. Cas. Eq. 77, 78).

But the testator may by his will shew an intention that the property as it then exists shall be specifically enjoyed, and the

Court rather leans in favour of this construction so far as it is consistent with the decision in the above case. Where perishable, wasting, or reversionary property is given to persons in succession *specifically*, in the strict sense of the word, then there can be no reason for converting it; and if an intention can be collected from the will, that property shall be enjoyed *in specie*, as it existed at the death of the testator, although the property be not, in a technical sense, specifically bequeathed, it will not be converted. The rule in the principal case will also not be applied if in the instrument there is to be found a sufficient indication of intention that it should not be. Thus an express direction for sale at a particular period, indicates an intention that there should not be any previous sale or conversion, so that an express trust to convert at the death of the tenant for life will entitle the tenant for life to specific enjoyment (Indermaur's Man. of Eq. 4th edit. 67, 68).

Where, under the rule in the principal case, a conversion ought to be effected by the trustees by reason of the property being invested in unauthorised securities, the tenant for life, even before conversion, will only be entitled to an income from the testator's death equal to the dividends of the Consols which would have been produced by a sale and investment in Consols at a year from the testator's death assuming that the unauthorised securities can be converted within the year (*Brown* v. *Gellatly*, L. R. 2 Ch. App. 751; *Kirkman* v. *Booth*, 11 Beav. 279). If they cannot be thus converted within the year then the tenant for life is entitled to 4 per cent. on what is subsequently ascertained to have been the then value of the property (*Meyer* v. *Simonson*, 5 De G. & S. 723). See further hereon Indermaur's Manual of Equity, 4th edit. 68–70.

HOOLEY v. HATTON.

(1 *Lead. Cas. Eq.* 865.)
(1 *Bro. C. C.* 390, *n.*)

Lady Finch, by her will, gave the plaintiff a legacy of £500, and afterwards, by a codicil, a legacy of £1000; and the question was, whether the last legacy alone passed, or the legatee should have both.

Decided:—That the plaintiff was entitled to both legacies; but that if a legacy of the same amount is given twice for the same cause and in the same act, and in the same or nearly the same words, then it will *not* be double; but where in *different* writings there is a bequest of equal, greater, or less sums, it is an augmentation.

Notes.—Although it would appear from this case that if the legacies are given by different instruments, they will never be considered as a repetition, yet this is not quite so, for even then, if they are for the same sum *and* the same motive, the Court presumes that they are but a repetition, but both these circumstances must exist.

It is important to observe whether extrinsic evidence can be given to shew whether a testator intended a legacy to be by way of augmentation or as a repetition, as, if so, the rules laid down in the above case might often be altered, and it is established on this point that, where the Court raises the presumption against double legacies, it will receive parol evidence to shew that the testator actually intended the double gift he has expressed, for that but rebuts the presumption of the Court,

and supports the apparent intention of the will; but where the Court raises no presumption, as where legacies are given by different instruments, it will not admit parol evidence to shew testator only meant the legatee to take one, for that would be to contradict the will (1 Lead. Cas. Eq. 875).

EX PARTE PYE.

(2 *Lead. Cas. Eq.* 366.)
(18 *Ves.* 140.)

Decided:—1. That as a general rule, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and in consequence of the leaning against double portions, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy either wholly or in part; and this applies where a person puts himself *in loco parentis*.

2. But no such presumption arises in the case of a stranger or of a natural child, where the donor has *not* put himself *in loco parentis*, unless the subsequent advance is proved to be for the very purpose of satisfying the legacy; and therefore the legatee will be entitled to both.

TALBOT v. DUKE OF SHREWSBURY.

(2 *Lead. Cas. Eq.* 375.)
(*Prec. Ch.* 394.)

Decided:—That if a debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt, to his creditor, this is a satisfaction; but it is not a satisfaction if it is bequeathed on a contingency, or if it were less than the debt.

CHANCEY'S CASE.

(2 *Lead. Cas. Eq.* 376.)
(1 *P. Wms.* 408.)

Testator, during his lifetime, and before making his will, gave his servant a bond for £100. He afterwards made his will and bequeathed her £500, *and directed that all his debts and legacies should be paid.*

Decided:—That the legacy was not here a satisfaction of the debt, because it was attended with particular circumstances varying it from the common rule, for the testator had directed that all his debts and legacies should be paid.

Notes on these three Cases.—These three cases are all authorities on, and illustrations of, the doctrine of satisfaction, which may be defined as the making of a donation with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee (Indermaur's Man. of Eq., 4th edit. 310). The first case given above is as to satisfaction of legacies by portions, and the latter two are as to satisfaction of debts by legacies. It is important to remember the great difference that exists in satisfaction in the case of portions on the one hand, and in the case of legacies to creditors on the other; for in the first case Equity, leaning against double portions, is in favour of the satisfaction, so that where there is a legacy to, or a settlement on a child, and a subsequent advancement on the marriage of such child, such advancement will be a satisfaction altogether if of the same or a greater amount, and if of a less amount it will be a satisfaction *pro tanto*; but in the second case it is just the opposite, for Equity will take hold of slight circumstances to rebut the presumption of satisfaction that would otherwise arise. This is well exemplified by *Chancey's Case*. There the direction

was that the testator's debts *and* legacies should be paid, but it has been recently held that a mere direction to pay debts, without adding the words "and legacies," will equally be sufficient to prevent a satisfaction (*Re Huish*, *Bradshaw* v. *Huish*, 43 Ch. D. 260; 59 L. J. Ch. 135). Another case that may be usefully referred to on the point is that of *Clark* v. *Sewell* (3 Atk. 96), and more particularly the recent case of *Re Horlock*, *Calham* v. *Smith* ((1895), 1 Ch. 516; 64 L. J. Ch. 325) the effect of which is that a legacy will never be a satisfaction of a debt, even though equal or greater in amount, unless by reason of a direction in the testator's will, or of the law, it is payable as a matter of right at as early a time as the debt is payable. Thus, as a legacy is strictly only payable after a year from the testator's death, it cannot satisfy a present debt unless directed to be paid at once. Indeed, in this class of cases satisfaction will never occur unless the legacy given to the creditor is equal to, or greater in amount than, the debt, and in every possible respect equally beneficial, and also provided that no intention appears that it is not to be a satisfaction.

If a debtor bequeaths to his creditor a legacy which would primarily operate as a satisfaction of the debt, and he then afterwards pays off the debt but does not alter his will, the doctrine of satisfaction still applies, and the legacy, if merely of the same amount as the debt, will not be paid, and if greater, only the difference will be paid (*Re Fletcher*, *Gillings* v. *Fletcher*, 38 Ch. D. 373; 57 L. J. Ch. 1032).

The principle upon which the Court leans against double portions, is founded upon the idea that the parent or person *in loco parentis* fixes the amount of the portion or provision for the child, and that any benefit he afterwards gives is on account of the obligation which he would otherwise have discharged at his death, and this explains why the doctrine has no operation in the case of persons towards whom the testator occupied no such relationship.

Satisfaction is sometimes styled ademption, and students are apt to get confused between cases of ademption and satisfaction, a matter which has been well explained thus: "When

the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will. With reference to cases . . . . of a previous settlement and a subsequent will . . . . it is now quite settled that there is no difference between the two cases beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases" (*Coventry* v. *Chichester*, 2 H. & M. 159).

With regard to the admissibility of extrinsic evidence on the point of satisfaction, the rule against double portions is a presumption of law, and, like other presumptions of law, may be rebutted by evidence of extrinsic circumstances. To vary or contradict the plain effect of a document where there is no presumption of law contrary to that effect, extrinsic evidence is not admissible; but to confirm the plain effect of a document where there is a presumption of law contrary to that effect, such evidence is admissible. Circumstances may also be given in evidence to rebut the presumption of satisfaction, and shew that no satisfaction was in fact intended (*Lacon* v. *Lacon* (1891) 2 Ch. 482; 60 L. J. Ch. 403).

LECHMERE v. LECHMERE.

(2 *Lead. Cas. Eq.* 399.)
(*Cas. t. Talb.* 26.)

By marriage articles Lord Lechmere covenanted to lay out £30,000 within one year after marriage in purchase of fee-simple lands in possession with consent of trustees, and settle same as therein provided. The covenantor was seised of some lands in fee-simple at the time of his marriage, and after his marriage he purchased some estates for lives, some reversionary estates in fee-simple, and after the year, and without the consent of the trustees, some fee-simple lands in possession. None of these properties were ever settled, but the covenantor simply died possessed of them, and the question was, whether these lands, or any and which of them, were to be taken as passing under the settlement by reason of the doctrine of performance, or whether they went to the heir-at-law.

Decided:—(1) That the purchase made before the covenant could not go in performance of the subsequent covenant, as it could not have been so intended. (2) That the estates for lives, and reversionary estates in fee-simple purchased after the marriage, could not go in performance of the covenant, not being fee-simple lands in possession within the meaning of the covenant. (3) That the purchase of lands in fee-simple made after the marriage, though not purchased within a year after the marriage, or

settled, must be intended to have been made in part performance of the covenant to lay out £30,000.

BLANDY v. WIDMORE.

(2 *Lead. Cas. Eq.* 407.)
(1 *P. Wms.* 323.)

In marriage articles the husband covenanted to leave his wife £620 if she should survive him. He died intestate, and his wife's share, under the Statute of Distributions, far exceeded £620.

Decided:—That the wife was *not* entitled to have the £620 *and* her distributive share, but that the distributive share must be taken as a satisfaction or performance of the covenant.

Notes on these two Cases.—The doctrine of "performance," which is illustrated by the above cases, bears rather closely on that of satisfaction; but on a very short consideration of the subject, and a comparison of the cases on satisfaction (see *ante*, pp. 133, 134) with those above given on performance, the distinction will be obvious. That distinction has been stated to be that "satisfaction implies the subtitution or gift of something different from the thing agreed to be given, but equivalent to it in the eyes of the law, while in cases of performance the thing agreed to be done is in truth wholly or in part performed." *Lechmere* v. *Lechmere* and *Blandy* v. *Widmore* exemplify the maxim, which is shortly stated as "Equity imputes an intention to fulfil an obligation," and it would appear, naturally, that where a covenant points to a *future* purchase of lands it cannot be presumed that lands of which the covenantor was seised at the time of the covenant were intended to be taken

in performance or part performance of it, nor can it be presumed that property of a different nature from that covenanted to be purchased was intended as a performance. But although by the settlement the consent of the trustee is required, still the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favourable to such presumption.

It should be mentioned that it has been decided that although a distributive share on an intestacy will be taken as performance of a covenant, yet a gift by will of a sum of money as a residue will not so operate *per se*, because it imports bounty. And where the covenant is not to pay a gross sum, but the interest of a sum of money for life, or a mere life annuity, the principle upon which *Blandy* v. *Widmore* was decided does not apply. This decision must also be carefully distinguished from the case of an actual debt being created in the lifetime of the covenantor. Thus in *Oliver* v. *Brickland* (3 Atk. 420) a husband covenanted to pay his wife a sum of money within two years, and he lived more than two years, but did not pay the money, and died intestate, and it was held that the widow was entitled to the amount covenanted to be paid, and also her distributive share.

CUDDEE v. RUTTER

(2 *Lead. Cas. Eq.* 416.)
(5 *Vin. Ab.* 530, *pl.* 21.)

Decided:—That a bill in Equity will not lie for specific performance of an agreement to transfer a certain sum of South Sea Stock, for there is no difference between that and any other like sum of stock, and no damage occasioned by the non-performance of the agreement specifically, if the difference is paid.

SETON v. SLADE.

(2 *Lead. Cas. Eq.* 475.)
(7 *Ves.* 265.)

Here plaintiff had agreed to sell certain property to defendant, and it was understood that he should make a good title in two months, and defendant gave him a notice that if he did not do so he should insist on the return of his deposit, with interest. The plaintiff, however, only delivered his abstract a few days before the expiration of the two months, which the defendant then received and kept without objection.

Decided:—That the vendee under the circumstances was not entitled to insist on time as of the essence of the contract, and so specific performance decreed.

LESTER v. FOXCROFT.

(2 *Lead. Cas. Eq.* 460.)
(*Colles' P. C.* 108.)

Here a certain parol contract had been made for the pulling down by the plaintiff of certain houses and the building up of others, and the granting of a lease thereof to him, and he had, in pursuance and part performance of such parol contract, pulled down the houses and built some of the others. The plaintiff brought this bill for specific performance of the contract.

Decided:—That the plaintiff was entitled to a decree for specific performance, notwithstanding the Statute of Frauds, because of the acts of part performance by him.

WOOLLAM v. HEARN.

(2 *Lead. Cas. Eq.* 513.)
(7 *Ves.* 211.)

Decided:—That though a defendant resisting specific performance may go into parol evidence to shew that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining specific performance with a variation.

Notes on these four Cases.—These cases are placed together as all relating to the subject of specific performance. *Cuddee* v. *Rutter* plainly shews the nature of the contracts of which

specific performance will be granted—viz., those for the breach whereof damages will not fully compensate; for the idea on which that case proceeded was, that practically any quantity of the stock might be had on the market; and it does not apply to shares which are limited in quantity, so that the Court has decreed specific performance of an agreement for the sale of a certain number of shares in a railway company (*Duncuft* v. *Albrecht*, 12 Sim. 199), and will do so in other cases of contracts relating to personal chattels, where damages will not compensate (see Indermaur's Man. of Eq., 4th edit. 251, 252, and see *post*, p. 145, the provisions of the Sale of Goods Act, 1893).

The case of *Seton* v. *Slade* shews that though terms may not have been strictly complied with, yet specific performance may be decreed. But in such a case the Court will take care to make proper compensation. And this principle of decreeing specific performance with compensation, is applied where the vendor seeks specific performance and has not exactly the interest he contracted to sell, but the difference is not material; but a purchaser cannot be forced to accept lands of a different tenure to what he contracted to buy, for this is not considered a matter for compensation.

The decision in *Lester* v. *Foxcroft* is upon the ground that, after a person has been allowed to do acts in part performance of a contract, it would be a fraud on the part of the person who has allowed him to do such acts not to perform his part of the contract. Acts to be a part performance must be exclusively referable to the agreement, done with no other view than to perform it, and must be such that it would be a fraud on the part of the other person, after having allowed such acts to be done, not to carry it out. Such acts as part or even entire payment of purchase-money, delivery of abstract, and the like, are *not* sufficient part performance; but letting a purchaser into possession is. The doctrine of part performance, ordinarily, only applies to contracts for the sale and purchase of land, but there may be other cases in which the Court will apply the doctrine (*McManus* v. *Cooke*, 35 Ch. D. 681; 56 L. J. Ch. 662).

There are also two other cases in which specific performance

of a parol contract will be decreed: and they are (1) where it is fully set forth by the plaintiff in his Statement of Claim, and admitted by the defendant in his Statement of Defence, and he does not insist on the statute as a bar; and (2) where the agreement was intended to be reduced into writing according to the statute, but that was prevented by the fraud of the other party.

With regard to the decision in *Woollam* v. *Hearn*—that a plaintiff cannot get specific performance of a contract with a parol variation—though good as a general rule, yet it must be noted that there are three cases in which a plaintiff may so obtain specific performance with a subsequent parol variation, and they are of similar nature to the three cases above stated, in which specific performance will be decreed of an originally parol contract—viz., (1) after such acts of part performance of the parol variation; (2) where defendant sets up the parol variation, and plaintiff seeks specific performance with it; and (3) where it has not been put into writing because of fraud. It will be seen that these cases are of an exactly similar nature to those above stated, in which specific performance will be decreed of an originally parol contract. The case also shews that though a plaintiff cannot generally get specific performance with a parol variation, yet it is always open to a defendant to set up such a variation, the reason being that the Statute of Frauds, although saying that an unwritten agreement as to the sale of land shall not bind, does not say that a written contract shall necessarily bind. Further, as a defence against proceedings for specific performance, parol evidence is admissible to shew that not only by fraud, but by mistake or even surprise, the written agreement does not contain the real terms, and such evidence may be given though it is actually in contradiction to the written contract (2 Lead. Cas. Eq. 522, 523, 530).

The subject of specific performance of contracts should be kept distinct from that of specific delivery of chattels irrespective of contract, a matter dealt with in the two next cases and the notes thereto.

PUSEY v. PUSEY.

(2 *Lead. Cas. Eq.* 454.)
(1 *Vern.* 273.)

The plaintiff brought this bill for specific delivery up of a certain horn which in ancient times was delivered to his ancestors to hold their lands by. The defendant demurred to this bill.

Decided:—That the demurrer must be overruled, and that the heir was entitled to the horn.

DUKE OF SOMERSET v. COOKSON.

(2 *Lead. Cas. Eq.* 455.)
(3 *P. Wms.* 389.)

The plaintiff, as lord of a certain manor, was entitled as treasure-trove to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules, and the defendant had obtained possession of the same. This suit was brought to obtain its delivery up *in specie* undefaced, and the defendant demurred.

Decided:—That this demurrer must be overruled.

Notes on these two Cases.—In the same way that the Court of Chancery has always only decreed specific performance of a contract when it was one for the breach whereof damages would not compensate, so the reason of the above decisions is that the chattel was of such a nature that the loss of it could not be fully compensated for by damages. There is, however, one case in which Equity has always decreed specific delivery

of a chattel though of no peculiar value, and that is where there subsists some fiduciary relation between the parties. Specific delivery of a chattel might, however, to a certain extent, in later times have been obtained at Law, for by the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), sect. 78, the Court might, upon the application of the plaintiff in an action for the detention of a chattel, order that execution should issue for the return of the same without giving the defendant the option of retaining it upon paying the value assessed; but a Court of Law under this enactment could only proceed to enforce the delivery by distringas, whilst a decree in Equity for specific delivery could always be enforced by attachment. This enactment was repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), but the provision is substantially continued by Order XLVIII. rule 1. Also, by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, sect. 52), it is provided that in any action for breach of contract to deliver the specific goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages. Such judgment may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment. This enactment is in substitution for a former provision contained in the Mercantile Law Amendment Act, 1856 (sect. 2).

It will be observed that the powers given as above mentioned to the Courts of Law are quite irrespective of any special or peculiar value in the chattel. Under the Judicature Act, 1873, any Division of the High Court of Justice can now give specific delivery of chattels, either under these Acts, or on the principle of special and peculiar value formerly acted on by the Court of Chancery.

EYRE v. COUNTESS OF SHAFTESBURY.

(1 *Lead. Cas. Eq.* 473.)
(2 *P. Wms.* 103.)

The former Earl of Shaftesbury, by his will, gave the guardianship of his infant son to the plaintiff and two others since deceased, without expressing that it was to be to the survivor of them, and the plaintiff now prayed that the infant (who was in his mother's custody) might be delivered up to him as his guardian.

Decided:—That although the guardianship was only given to the three persons without saying "and to the survivors or survivor of them," yet the survivor—the plaintiff—should have it.

Afterwards, when the infant was of the age of fourteen years, his mother, the Countess, procured his marriage with one Lady Susannah Noel, without the consent or privity of the plaintiff, the guardian.

Decided:—That the Countess was liable for a contempt of Court, although the marriage was in other respects proper.

Notes.—There are properly six species of guardianship—viz. (1) By nature; (2) By nurture; (3) In socage; (4) By statute; (5) By appointment of the Court; (6) *Ad litem.* There is also guardianship by custom, and the quite obsolete species of guardianship by election (see Stephen's Com. 12th edit. vol. ii. pp. 309–314.)

The above is the leading case on the nature of the guardian-

ship and the guardian's powers under the statue 12 Car. 2, c. 24. That statute gives the *father** the power by deed, or by his last will and testament, to appoint the custody and tuition of such of his children as at the time of his death are neither of full age, nor married, until they attain the age of twenty-one years, or during any less period. This power, however, does not apply to illegitimate children (*Sleeman* v. *Wilson*, L. R. 13 Eq. 36). This statute of course only gives the power to the *father;* but a stranger may to a certain extent appoint a guardian, for such an appointment will be effectual if there is a legacy to the father conditional on his giving up the guardianship, which legacy the father elects to take, for if he accepts the benefit, or commits the care of the children to the guardian nominated by the stranger, he will not afterwards be allowed to prejudice their interests by interfering to take them again into his custody (Indermaur's Man. of Eq. 4th edit. 273).

And now, under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), a mother has also a power of appointing a guardian to her children, and is herself under certain circumstances constituted the guardian. Section 2 of that Act provides that, on the death of an infant's father (and in case the father died before 25th June 1886, then from that date), the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father, subject to this, that if no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it thinks fit, from time to time appoint a guardian or guardians to act jointly with the mother. Section 3 provides: (1) That the mother of any infant may by deed or will appoint any person or persons to be guardian of such infant after the

* The above statute gives this power to the father, whether he is of full age or not; but now, as by the Wills Act (1 Vict. c. 26) an infant cannot make a valid will, he cannot appoint a guardian by will, but only by deed.

death of herself and the father, if such infant is then unmarried, and when guardians are appointed by both parents they shall act jointly; (2) that the mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father; and the Court after her death, if shewn to its satisfaction that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered to act as aforesaid, or may make such other order in respect of the guardianship as it thinks right. Section 7, however, provides that the Court which pronounces a decree for judicial separation, or a decree nisi or absolute for a divorce, may, by such decree, declare the parent by reason of whose misconduct the decree is made, to be a person unfit to have the custody of the children of the marriage, in which case that parent shall not on the death of the other be entitled as of right to the custody or guardianship of such children.

By statute 2 & 3 Vict. c. 54 it was provided that judges in Equity might make orders, on petition, for the access of mothers to their infant children, and if such children were within the age of seven years for delivery of them into the mother's custody until attaining such age of seven years; but no order was to be made under such provision in favour of a mother against whom adultery had been established. This statute is now repealed by the 36 Vict. c. 12, which in lieu thereof provides (sect. 1) that the Court of Chancery may order mothers to have access to, or custody or control of, their children until they shall attain such age as the Court shall direct, not exceeding the age of sixteen. The exercise of this power is, however, a matter entirely in the Court's discretion (*Re Besant*, *Besant* v. *Wood*, 12 Ch. D. 605; 48 L. J. Ch. 497). There is also now a wider provision on this subject in the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 29, sect. 5), under which the Court may on the application of the mother make such order as it

thinks fit with regard to the custody of or access to any infant, and may vary such order from time to time. Under this provision it has been held that the Court has jurisdiction to order the delivery of an infant to the custody of its mother without fixing any limit of age (*Re Witten*, 57 L. T. 336).

Provision is also made by the Divorce Act (20 & 21 Vict. c. 85, sect. 35) enabling the Divorce Court, in any divorce, judicial separation, or nullity of marriage proceedings, to make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings. And by the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39, sect. 5), it is provided that on a magistrate making an order under that Act, which is to have the effect of a judicial separation between husband and wife, he may also give to the wife the custody of the children of the marriage up to the age of sixteen years.

It is also provided by 36 Vict. c. 12 (sect. 2) that no agreement in a separation deed for the father giving up the custody of his children to the mother shall be invalid, but the same is not to be enforced by the Court if it is of opinion that it will not be for the benefit of the infant or infants to give effect to it. Formerly the rule was that he could not contract away the obligation with regard to his children thrown upon him by the law, unless he had been guilty of such gross misconduct as totally to unfit him to have their custody and control, when in fact the Court, on being applied to, would have deprived him of their custody (*Swift* v. *Swift*, 34 Beav. 266).

It has been held that an *ante-nuptial* agreement made by a father, to have the children of the marriage brought up in a particular religion, cannot be enforced, since a father cannot abdicate his right to have his children brought up in accordance with his own religious views (*Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 48 L. J. Ch. 1).

STAPILTON v. STAPILTON.

(1 *Lead. Cas. Eq.* 223.)
(1 *Atk.* 2.)

Decided:—That an agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards appears that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

That where agreements are entered into to save the honour of a family, and are reasonable ones, a Court of Equity will, if possible, decree a performance of them.

GORDON v. GORDON.

(3 *Swanst.* 400.)

Here there had been an agreement between two brothers for the settlement of the family estates, as the younger disputed the elder's legitimacy. At the time of the agreement, however, the younger brother was aware of a private marriage that had taken place, and this was not communicated to the other. The legitimacy of the elder brother was afterwards established, and, although some nineteen years had elapsed,—

Decided:—That the agreement must be rescinded

because of the concealment by the younger brother of the fact of the private marriage, and that it mattered not whether the omission to disclose it originated in design, or in an honest opinion of the invalidity of the ceremony, and a want of obligation on his part to make the communication.

Notes on these two Cases.—The rule as to family compromises is laid down in Snell's Principles of Equity (11th edit. 458) thus:—"In order that a family arrangement may be supported, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for by the other party or not. There must not only be good faith and honest intention, but full disclosure; and without full disclosure honest intention is not sufficient."

Stapilton v. *Stapilton* is given in Messrs. White and Tudor's book as the leading case on this subject; but the facts and decision in *Gordon* v. *Gordon* are also given above, as it is thought that case constitutes a more forcible illustration of the subject.

PENN v. LORD BALTIMORE.

(1 *Lead. Cas. Eq.* 755.)
(1 *Ves.* 444)

Here the plaintiff and defendant, being in England, had entered into articles for settling the boundaries of two provinces in America—Pennsylvania and Maryland—and the plaintiff sought a specific performance of the articles. The principal objection was that the property was out of the jurisdiction of the Court.

Decided:—That the plaintiff was entitled to specific performance of the articles, for though the Court had no original jurisdiction on the direct question of the original right of the boundaries, the property being abroad, yet that did not at all matter, as the suit was founded on the articles, and the Court acted *in personam*.

Notes.—The above case forms a good illustration of the well-known maxim or principle, "Equity acts *in personam*;" a maxim which, indeed, shews the great difference in the jurisdiction of Equity to that of Law: thus at law the only remedy on a breach of contract was an action for damages; but in Equity, as the Court acted *in personam*, the party could always, when proper, be compelled to do the very act. So in this case, although the property was abroad, and therefore the Court really in respect of the property had no jurisdiction, yet, the parties being here, the Court was able to award the appropriate remedy, acting not at all on the property, but directly on the persons.

PEACHEY v. DUKE OF SOMERSET.

(2 *Lead. Cas. Eq.* 250.)
(1 *Stra.* 447.)

Here the plaintiff was tenant of copyhold lands in a manor of which the defendant was lord. He committed acts of forfeiture by making leases contrary to the custom, without licence, and by felling timber, &c., and he now brought this suit, offering to make compensation and praying relief from the forfeitures.

Decided:—That the plaintiff was *not* entitled to relief; and that the true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the Court can give by way of recompense all that was expected or desired.

SLOMAN v. WALTER.

(2 *Lead. Cas. Eq.* 257.)
(1 *Bro. C. C.* 418.)

The plaintiff and defendant were partners in the Chapter Coffee House, and it had been agreed that defendant should have the use of a particular room when he wanted it, and the plaintiff gave a bond to secure this. Upon breach of the agreement, defendant brought an action for the penalty of the bond, and the plaintiff brought this suit for an injunction, and for the actual damage sustained by defendant to be assessed.

Decided:—That plaintiff was entitled to an injunction, and that the rule is, that where a penalty is inserted merely to secure the enjoyment of a *collateral object*, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as additional, and to secure the damages really incurred.

Notes on these two Cases.—The relief given by the Court in the case of penalties and forfeitures furnishes a good illustration of the maxim, "Equity regards the spirit and not the letter." The rule as to when Equity will relieve in such cases is well stated in the latter of the above two decisions, whilst the former shews an instance beyond the relief of Equity—viz., the forfeiture of an estate or interest as distinguished from a penalty. It should be observed also that *Sloman* v. *Walter* shews that the jurisdiction of Equity as to relief against penalties, is not so limited as to extend only to those penalties intended to secure payment of a sum of money, as might appear from *Peachey* v. *Duke of Somerset*, but that it also extends to penalties to secure *performance of some collateral act.*

Care must be taken to distinguish between a penalty and a sum which is really liquidated damages; not that it follows that, because parties stipulate that a sum shall be paid on breach of a contract "as and for liquidated damages," the Court will always so consider the sum, for, notwithstanding it is so called, it may be a penalty in the disguise of liquidated damages (see *Kemble* v. *Farren*, 6 Bing. 141). But where the sum stipulated to be paid is really and in fact liquidated damages, then the Court will not interfere. The question of liquidated damages or a penalty is, however, one very often most difficult to determine, and depends upon the construction of the whole instrument taken together (see *Wallis* v. *Smith*, 21 Ch. D. 258; 52 L. J. Ch. 149).

The doctrines of Chancery in giving relief in the case of penalties and forfeitures are not now peculiar to the Chancery

Division, but the same construction will be put with regard to them in all Divisions of the Court (Judicature Act, 1873, sect. 25 (7).

By reason of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, sect. 14), a right of re-entry or forfeiture under a lease is not enforceable until service on the lessee of a notice specifying the breach; and if capable of remedy, requiring the lessee to remedy it; and in any case requiring the lessee to make compensation in damages for the breach, and the lessee fails within a reasonable time to conform with the notice. It is only necessary that the notice should point out the breach and require it to be remedied, it need not also demand compensation (*Lock* v. *Pearce* (1893), 2 Ch. 271; 62 L. J. Ch. 582). The Court has also, under the same provision, full power of granting relief against the forfeiture. This provision does not, however, extend to a covenant or condition against assigning, underletting, or parting with the land, or to a condition for forfeiture on bankruptcy or execution, nor in the case of a mining lease to a covenant or condition for access, or inspection of books, accounts, weighing-machines, &c. With regard, however, to forfeitures for bankruptcy or execution see the amending provision of the Conveyancing Act, 1892 (55 & 56 Vict. c. 13, sect. 2), under which, with certain exceptions, the forfeiture cannot be enforced for a year, and not at all if the lessee's interest is sold within the year. Section 14 of the Conveyancing Act, 1881, does not affect the law relating to forfeiture for non-payment of rent, as to which the Court of Chancery at an early date assumed jurisdiction to give relief within six months, and by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, sect. 1), it is provided that in an action of ejectment similar relief may be given.

The case of *Barrow* v. *Isaacs* ((1891) 1 Q. B. 417; 60 L. J. Q. B. 179) illustrates very strongly the principle laid down in *Peachey* v. *Duke of Somerset*. In that case the covenant was not to assign or underlet without licence, which was not, however, to be arbitrarily withheld, and there was a condition of re-entry on breach of such covenant. This, as

has been noticed, is one of the covenants excepted in sect. 14 of the Conveyancing Act, 1881. Through forgetfulness an underletting was made without licence, but no harm was done the lessor, and had the licence been applied for it could not have been withheld. Yet the Court of Appeal held the lessee had forfeited his estate, and that the forfeiture could not be relieved against.

Where a person contracts to do or not to do an act, and, should he not conform to his contract, binds himself to pay a certain sum, it is not in his option to break his contract and pay the money. And even where there is no direct contract to do or not to do an act, but the party binds himself in a certain penalty should he not do it, or should he do it, as the case may be, the rule is still the same, as a contract can be in substance extracted from the whole instrument (*London and Yorkshire Bank Limited* v. *Pritt*, 56 L. J. Ch. 987; 36 W. R. 135).

LANSDOWNE v. LANSDOWNE.

(2 *Jacob & Walker*, 205.)

In this case the plaintiff, who was a son of the eldest brother of a deceased intestate, had a dispute with his uncle, a younger brother, respecting the right to inherit the real estate of the deceased. They referred the matter to a schoolmaster, who, acting on the axiom, "Land cannot ascend, but always descends," awarded in favour of the uncle (the younger brother).

This bill was filed by the son of the elder brother to be relieved.

Decided:—That the plaintiff was entitled to relief, and decreed accordingly, notwithstanding the maxim, *Ignorantia legis non excusat.*

EARL BEAUCHAMP v. WINN.

(*L. R. Eng. & Ir. App.* 223.)

The late Earl Beauchamp and the defendant had entered into an exchange of property, including a certain warren of conies, both proceeding upon the belief that the Earl had only the right of warren over the lands, and that defendant had the right to the lands themselves. Subsequently the original lease was found, and the Earl considered that it passed to him not merely the right of warren, but the right to the land itself. This suit was

commenced to rescind the agreement for exchange as being entered into in mutual ignorance and mistake. It was held by the judges that the words in the lease did not carry the soil, but only the right of warren; but had it been otherwise, relief might have been given to the plaintiff; and the following points on the subject of mistake were laid down:—

1. Where in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of Equity is in favour of interposing to grant relief.

2. Although the parties have subsequently to the agreement dealt with the property, or other circumstances have intervened, so that it may be difficult to restore them to their original condition, the Court will not, if a ground for relief is established, decline to grant such relief.

3. The rule, *Ignorantia legis non excusat*, though applying where the alleged ignorance is that of a well-known rule of law, does *not* so apply where the mistake is of a matter of law arising upon the doubtful construction of a grant.

4. Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

Notes.—A mistake as remediable in Equity may be defined as some unintentional act, or omission, or error, arising from

ignorance, surprise, imposition, or misplaced confidence (Indermaur's Man. of Eq., 4th edit. 201).

It is usually said that "*Ignorantia facti excusat*," but "*Ignorantia legis non excusat*"; but these two simple maxims do not at all adequately answer the question, When will Equity give relief in cases of mistake? This is, indeed, a question rather difficult to answer properly in a short space; but the law on the subject seems to be as follows:—Mistakes may be divided into (1) Mistakes in matters of fact, and (2) Mistakes in matters of law; and as to the latter no relief will be given, *except* when the mistake is one of title arising from ignorance of a principle of law of such constant occurrence as to be supposed to be understood by the community at large. The case of *Lansdowne* v. *Lansdowne* given above is on this exception; and even here the real reason of relief being given seems to be that the mistake is of such a kind that it gives rise to an almost irrebuttable presumption of undue influence, imposition, mental imbecility, surprise, or confidence abused, so that to some extent it may fairly be said that the exception is more apparent than real, that the mistake of law is not the foundation of the relief, but is the medium of proof to establish some other proper ground of relief. The rule of "*Ignorantia legis non excusat*" also does not apply where the mistake is of a matter of law arising upon some point of doubtful construction, for the ignorance before a decision of what was the true construction, cannot deprive a person of his right to relief. It is very different to a well-known rule of law (see *Earl Beauchamp* v. *Winn*, *ante*, p. 157.).

With regard to mistakes of fact, the mistake may be either unilateral or on one side only—in which case if relief is given it is more on the ground of surprise or fraud practised on the other party than strictly on the ground of mistake—or it may be a mutual mistake on the part of both parties. In all cases, however, to entitle a person to relief, the fact on which there was the mistake must have been one material to the matter. Acquiescence in a mistake will deprive a person of any right to be relieved against it. In *Earl Beauchamp* v. *Winn* the

alleged mistake had existed for more than sixty years, and it was argued in that case that the appellant was barred by his acquiescence, which might be implied from length of time, but it was decided that the ignorance of the appellant prevented any acquiescence on his part.

The remedy given by the Court in cases of mistake is sometimes rescission of the contract, and sometimes rectification of its terms. The general rule is that when a mistake is mutual the Court will rectify the instrument by substituting the terms really agreed on; but when the mistake is unilateral then the remedy is rescission, though the Court may if it thinks fit to do so, in lieu of rescission, give the defendant the option of having the contract rectified, so as to make it in fact what the plaintiff intended it should have been (Indermaur's Man. of Eq. 4th edit. 203).

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